# American Bar Association Journal

November 1953

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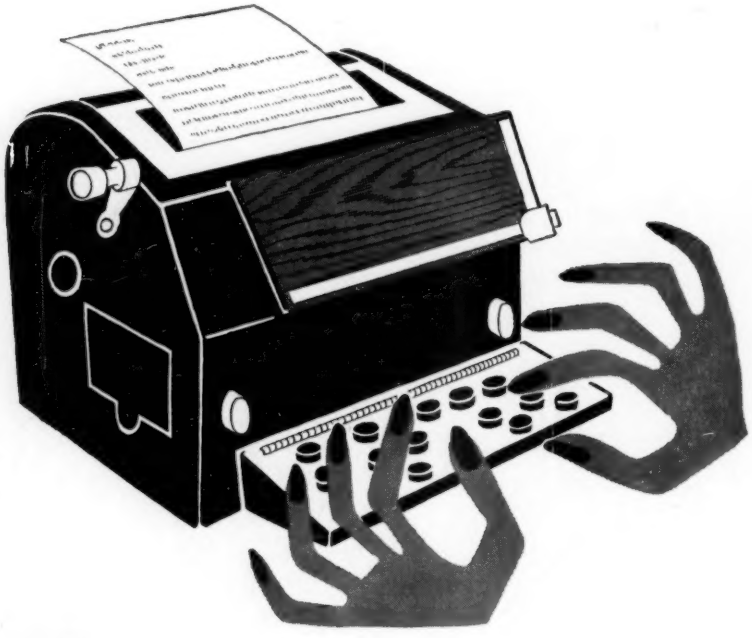
# **dispatch** *is a message*



*but*

# Dispatch

*is a newspaper*


Every edition of the Dispatch is full of dispatches from the far corners of the world. That's one thing that gives the Dispatch character and standing as a newspaper.

Another is the paper's ability to keep its identity clear. This it does by making sure that its name is always properly spelled . . . and properly begun with a capital "D".

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# Contents

**NOVEMBER, 1953**




THE AMERICAN BAR ASSOCIATION JOURNAL is published monthly by the AMERICAN BAR ASSOCIATION at 1140 North Dearborn Street, Chicago 10, Illinois.
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# The President's Page

**William J. Jameson**

■ Thus far, I have had the privilege of attending the annual meetings of the state Bars of Utah, North Dakota, South Dakota, Montana, Wyoming, Michigan and West Virginia. All have been marked by large attendance and increased interest in the program of the organized Bar, particularly in the various activities in the field of continuing legal education. In North Dakota and Wyoming, both integrated Bars, over half of the lawyers of the state attended the annual meetings. In Wyoming, the increase in attendance was attributable, in part, to the fact that all courts, both state and federal, adjourned for the duration of the meeting. Most of the judges were in attendance themselves and voted to continue this practice in the future. It is followed in a few other states. The co-operation of the judges is most helpful in promoting attendance and interest in bar meetings.

The committees for the current Association year have been appointed. I appreciate the recommendations for committee appointments which I have received from all parts of the country. They show a commendable and wholesome interest in the Association. Almost without exception, those who were recommended are all well qualified and would have made excellent committee members. Unfortunately, all could not be appointed. Members of Standing Committees are now appointed for three-year terms with the result that the appointments this year to seven-member committees were limited to two in number for each committee and appointments to three- and five-member committees to one per committee. Obviously, it was advisable to reappoint some whose terms expired. In the case of Special Committees, most are engaged in a specific study or project, and it seemed wise to reappoint the same personnel. As a result, the new appointments were limited to a relatively small number. It is hoped that, during the year, a definite place may be found for other members who have manifested a desire to be more active in Association work.

The Association continues to receive from congressional committees requests for the views of the Association on pending legislation and for the appointment of advisory committees to co-operate with congressional committees. During the past month, two such committees have been appointed or recommended. A Committee to recommend changes in the Atomic Energy Act of 1946, appointed at the request of the Chairman of the Joint Congressional Committee on Atomic Energy, is headed by Dean E. Blythe Stason of the University of Michigan and is composed of the following members: Gordon Dean, Washington, D.C.; Robert H. Gerdes, San Francisco; William T. Gossett, Dearborn, Michigan; Paul W. McQuillen, New York City; Casper W. Ooms, Chicago; Edwin J. Putzell, Jr., St. Louis.

Norman M. Littell, of Washington, D. C., Arthur Littleton, of Philadelphia, Pennsylvania, and Paul Carrington, of Dallas, Texas, were recommended to serve upon the advisory committee of the Senate Banking and Currency Committee in a study of certain problems relating to our foreign trade. In a letter expressing his appreciation of the recommendation of these members, Senator Homer E. Capehart, of Indiana, Chairman of the committee, paid this tribute to the Association:

> For over 150 years since the inception of our Republic, lawyers have made vital contributions to the drafting and amending of our laws. In recent years the American Bar Association, with its numerous sections and subdivisions into committees, has developed into a veritable university of seminars and study groups exploring the practical application and improvement of almost every branch of the law. During the last year and continuing as of this moment, the participation of the American Bar Association in the study of the Bricker and other amendments pertaining to the possible amendment of the Constitution in respect to the treaty making powers of the President (without reference to whatever position has been finally taken by the Bar Association) has helped immensely in carrying the debate to the American people in terms which they can understand. This type of collaboration between your Association and both Houses of Congress in bringing to bear the talent and ability of your membership upon the problems which confront Congress, is highly desirable and ought to be extended.

# American Bar Association Journal

*the official organ of the*

AMERICAN BAR ASSOCIATION

*published monthly*


The objects of the American Bar Association, a voluntary association of lawyers of the United States, are to uphold and defend the Constitution of the United States and maintain representative government; to advance the science of jurisprudence; to promote the administration of justice and the uniformity of legislation and of judicial decisions throughout the nation; to uphold the honor of the profession of law; to apply its knowledge and experience in the field of the law to the promotion of the public good; to encourage cordial intercourse among the members of the American Bar; and to correlate and promote such activities of the Bar organizations in the nation and in the respective states as are within these objects, in the interest of the legal profession and of the public. Through representation of state, territory and local bar associations in the House of Delegates of the Association, as well as large membership from the Bar of each state and territory, the Association endeavors to reflect, so far as possible, the objectives of the organized Bar of the United States.

There are seventeen Sections for carrying on the work of the Association, each within the jurisdiction defined by its by-laws, as follows: Administrative Law; Antitrust Law; Bar Activities; Corporation, Banking and Business Law; Criminal Law; Insurance Law; International and Comparative Law; Judicial Administration; Labor Relations Law; Legal Education and Admissions to the Bar; Mineral Law; Municipal Law; Patent, Trade-Mark and Copyright Law; Public Utility Law; Real Property, Probate and Trust Law; Taxation; and the Junior Bar Conference. Some issue special publications in their respective fields. Membership in the Junior Bar Conference is limited to members of the Association under the age of 36, who are automatically enrolled therein upon their election to membership in the Association. All members of the Association are eligible for membership in any of the other Sections.

Any person who is a member in good standing of the Bar of any state or territory of the United States, or of any of the territorial groups, or of any federal, state or territorial court of record, is eligible to membership in the Association on endorsement, nomination and election. Applications for membership require the endorsement of a member of the Association in good standing and are considered in each case by a Committee on Admissions of the appropriate state. If the applicant is a member of the Bar of the state or territory in which he resides or has his principal office, or is a member of a federal, state or territorial court of record of a state or territory in which he resides or has his principal office, the application is referred to the Committee on Admissions for one of such states or territories. If, however, the applicant is not a member of the Bar of the state or territory in which he resides or has his principal office, the application is referred to the Committee on Admissions for one of those states or territories or is referred to the Committee on Admissions for a state or territory in which the applicant formerly resided and to the Bar of which he was admitted. Upon the approval of an application by a majority of the proper Committee on Admissions, an applicant is deemed nominated for membership. All nominations made pursuant to these provisions are reported to the Board of Governors for election. Four negative votes in the Board of Governors prevent an applicant's election.

Dues are $16.00 a year, except for the first two years after an applicant's admission to the Bar, the dues are $4.00 per year, and for three years thereafter $8.00 per year, each of which includes the subscription price of the JOURNAL. There are no additional dues for membership in the following Sections: Bar Activities, Criminal Law, Judicial Administration, Legal Education and Admissions to the Bar, and the Junior Bar Conference. Dues for the Section of Administrative Law, the Section of Antitrust Law, the Section of Labor Relations Law and the Section of Patent, Trade-Mark and Copyright Law are $5.00 a year; dues for the Section of Taxation are $6.00 a year; dues for all other Sections are $3.00 a year.

Blank forms of proposal for membership may be obtained from the Association offices at 1140 North Dearborn Street, Chicago 10, Illinois.

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# Views of Our Readers

■ Members of our Association are invited to submit short communications expressing their opinions, or giving information, as to any matter appearing in the *Journal* or otherwise within the province of our Association. Statements which do not exceed 300 words will be most suitable. The Board of Editors reserves the selection of communications which it will publish and may reject because of length. The Board is not responsible for matters stated or views expressed in any communication.

## A New Hampshire Yankee on Holmes and Laski

■ I have read much of Holmes—biographies and the Holmes-Pollock letters. He demonstrates immense energy and industry in intellectual attainment. By any comparison, my own is a wasted life. He was not interested in everyday life as such and did not read newspapers. His complaint of being lonely stemmed from the absence of men similarly interested in intellectual pursuit. My own guess is that his position as a judge forced some loneliness, because judges do not always fraternize with lawyers. Apparently, he could read Laski's socialistic writings and disagree intellectually whereas my own reading provoked me to irritation. Laski wrote what to me was simply not true and I could not find pleasure in my disagreement.

I wonder that Holmes did not specifically answer what Laski urged—and Marx. Holmes was content to deal with the law as he found it, though enriching what he found by intellectual exposition—in his work, *The Common Law,* and in his opinions. I doubt if he ever was active in practice or could have succeeded as an adviser or as an advocate. He seems to me not to have had the patience to build with common bricks: he dealt with the structures that came to him as a judge after the efforts of the lawyers had completed the structure of the case. It is one thing to decide an issue when the facts are all brought together in a bound volume; it is quite another thing to review factual possibilities in advance of trial to make certain that what is later bound together will cover the whole ground. Therein lies the difference between the judge and the lawyer. The lawyer must deal with the human bricks that go into the building, the strength of which has to be judged.

This does not mean that the lawyer manufactures the bricks or does anything wrong. I may illustrate this by reference to a case that I tried years ago before Judge Peaslee, who told me that my client was the best witness he had ever listened to. What had I done? When this client, a woman, came to me, she was so overwrought over her claim that she had been defrauded in her purchase of a parcel of real estate she could not think straight. Her story tumbled out without sequence and without reference to important dates. All I did was to carry her back over the details and bring them into orderly sequence so that when she took the witness stand she could start at the beginning and support each answer by reference to specific dates, bank deposits and withdrawals and so on.

Holmes could decide on the evidence presented whether the law required granting or denial of relief—but I doubt if it would have pleased him to dig out the evidence in the first place. Intellectually I suppose Holmes would have been interested in the problems of a competent practicing attorney, and could have discussed them with him so long as the burden of collection of evidence was not borne by Holmes. This may be the reason he did not directly answer Laski—he liked to see the man's mind work but he himself could not carry the details required for specific answer.

From what I have read of and by Laski, I would call him worse than a parlor pink. Apparently, he grieved for the common man—as I see it without full realization that the common man would be worse off were it not for that rare animal, the uncommon man. The common man is impatient with any attempt to instruct him in philosophy, sociology, economics or anything else; he asks amusement—witness the income of the uncommon entertainers—amusement, and security that someone else will pay for. This is not stated viciously because I concede that the common man generally is willing to work—though he listens too readily to those who tell him he is abused and ought to own everything. The great danger for the common man in this country is that he will follow the preachments of the Laskis without appreciation of the present independence which is his until he has lost that independence entirely. Laski's greatest weakness was his failure to recognize man's fundamental demand for individual independence.

LOUIS E. WYMAN
Manchester, New Hampshire

## Wants U. S. To Adopt Code

■ Four fifths of the world now operates under general codes applying uniformly to large areas that were previously governed by many diverse laws. These codes were passed by some general authority and not by the constituent states of each country.

The United States needs such a code instead of some fifty local sets of statutes under which we now operate to our obvious confusion. We are making some progress by suggesting Uniform Laws on a few subjects and gradually getting them passed by the state legislatures and by suggesting court decisions under the Restatements.

These methods however will be very slow, perhaps several centuries, in accomplishing the desired ends. But if we could pass an Amendment to our Federal Constitution authorizing the appointment of a commission to prepare a general code to be enacted into law by the Congress, we could make progress relatively quickly. And thus our dream of an American code would become a reality.

McCune Gill

St. Louis, Missouri

**Two Comments on the Ross Prize Essay**

■ As a preface to her Ross Prize Essay, "A Free Press and a Fair Trial", Mrs. Lois G. Forer cites Shakespeare's lines:

> 'Twill be recorded for a precedent,
> And many an error, by the same example, Will rush into the state . . . .

Notwithstanding, Mrs. Forer is herself guilty of perpetuating a serious error, in asserting that

> The painstaking research of Sir John Fox has revealed the *utter want of precedent* for the doctrine of contempt by publication. [39 A.B.A.J. 801, Italics added].

In an article, "Constructive Contempt—A Post Mortem", published in 9 *U. of Chi. L. Rev.* 602 (1942), the writer showed that Fox at most demonstrated that the summary contempt power was not based upon "immemorial usage", *id.* at 606, 613-614, but that it nonetheless had respectable and long-established judicial and parliamentary precedent, and that the very cases collected by Fox "disclose that the power was completely established in the early 18th century". *Id.* at 606. No refutation of the elaborate analysis of the English authorities there set forth has since appeared.

Mrs. Forer likewise calls attention to the fact that the Supreme Court now reads the First Amendment to limit the summary power over contemptuous publications. 39 A.B.A.J. at 802. The "Constructive Contempt" article (pages 614-627) also marshaled the historical materials which showed that the Framers of the Constitution had no such thought in mind, that there were resounding constructive contempt cases before and not long after the adoption of the Constitution, and that contemporary critics never questioned the existence of the power. To the contrary, Chief Justice McKean of the Supreme Court of Pennsylvania, for example, who was an "ardent advocate of the Constitution", held in 1789 that the summary power was not curtailed by the Pennsylvania "free press" provision. *Id.* at 619. Even in the heat of the impeachment proceedings brought in 1831 against Judge Peck in the Congress, the continued existence of the common law power over contemptuous publications was repeatedly recognized. *Id.* at 624. The contrary view was first enunciated in *Bridges* v. *California*, 314 U.S. 252 (1941), a decision from which Stone, Frankfurter, Roberts and Byrnes, JJ., dissented. A dissent of such dimensions raises rather than settles doubts.

Though a Ross Essay is perhaps not the medium in which to sift such differences, it should at least take account of them. In deciding, judges may glide over unpalatable precedents or history. But for a scholar, history has its claims.

Raoul Berger

Washington, D. C.

■ There is a slight factual inaccuracy in the footnote numbered 33 to the 1953 Ross Prize Essay, "A Free Press and a Fair Trial", by Mrs. Lois G. Forer which footnote appears on page 843 in the September, 1953, number of the Journal. Mrs. Forer says that Massachusetts is one of the five states whose state constitutions do not guarantee the right of free speech and provide that there shall be responsibility for its abuse. Article XVI of the original constitution of Massachusetts provided "The liberty of the press is essential to the security of freedom in a state: it ought not, therefore, to be restrained in this commonwealth." In 1948 the following sentence was added by way of amendment. "The right of free speech shall not be abridged."

James M. Rosenthal

Pittsfield, Massachusetts

# A Holiday Gift Suggestion—

This collection—fourteen in all—is made up of photographic reproductions, on art-portrait paper, of the following: Gilbert Stuart painting of John Jay; Trumbull painting of John Rutledge; painting by Earle of Oliver Ellsworth; painting by Peale of John Marshall; engraving of Roger B. Taney; photographs by the famous Brady, who recorded the Civil War in pictures, of Salmon P. Chase and Morrison R. Waite; and favorite studio photographs of Charles Evans Hughes, Melville W. Fuller, Edward Douglass White, William Howard Taft, Harlan F. Stone, Fred M. Vinson and Earl Warren—

## the Chief Justices of the United States

Each reproduction, 8" x 10" in size, is designed for framing and would greatly enhance the attractiveness of your law office or library. If you cannot use a full set, individual prints are available. Set of fourteen in folio . . . $25.00; Individual prints . . . $3.00. **AMERICAN BAR ASSOCIATION JOURNAL, 1140 North Dearborn Street, Chicago 10, Illinois**

# ANNOUNCEMENT

## *of*
## *1954 Essay Contest*
## *Conducted by*
## AMERICAN BAR ASSOCIATION

*Pursuant to terms of bequest of* Judge Erskine M. Ross, deceased.

**INFORMATION FOR CONTESTANTS**

**Time When Essay Must Be Submitted:** On or before April 1, 1954.

**Amount of Prize:** Twenty-five Hundred Dollars.

**Subject To Be Discussed:**
"The Investigating Power of Congress, Its Scope and Limitations."

**Eligibility:**
The Contest will be open to all members of the Association in good standing, including new members elected prior to March 1, 1954 (except previous winners, members of the Board of Governors, Officers and employees of the Association), who have paid their annual dues to the Association for the current fiscal year in which the essay is to be submitted.

No essay will be accepted unless prepared for this Contest and not previously published. Each entryman will be required to assign to the Association all right, title and interest in the essay submitted.

**Instructions:**
All necessary instructions and complete information with respect to number of words, number of copies, footnotes, citations, and means of identification, may be secured upon request to the American Bar Association.

**AMERICAN BAR ASSOCIATION**
1140 North Dearborn Street — Chicago 10, Illinois

# The Task of Maintaining Our Liberties:

# The Role of the Judiciary

by **Robert H. Jackson** • Associate Justice of the Supreme Court of the United States

▪ Our traditional freedoms, says Mr. Justice Jackson, "are less in danger of any sudden overthrow than of being gradually bartered or traded for something else on which the people place a higher current value". And he concludes that, in the last analysis, it must be the people, rather than the courts and judges, who permanently guard liberty. The following paper was the principal address at the dinner in honor of the Judiciary of the United States, sponsored jointly by the Section of Judicial Administration, Conference of Chief Justices and the National Conference of Judicial Councils, on August 24, during the Diamond Jubilee Meeting of the Association in Boston.

▪ There is a lesson for us in the unique and ancient office of Lord High Chancellor. Our forefathers understood, on high authority, that England had strictly separated executive, legislative and judicial functions. Thinking well of the example, they made separation of these powers the basic principle of our Constitution. Their misunderstanding is apparent. The Lord High Chancellor is at once the highest judicial officer in the realm of Elizabeth II, a minister in the cabinet of Sir Winston Churchill's government, and the presiding officer of the upper legislative house. It would not be impossible for him faithfully to follow a precedent (that still being a custom in England), though he regarded it as outmoded, and then to sponsor and manage in the House of Lords a bill to correct the mischief he had perpetuated as a judge. Perhaps this combination of judicial, legislative and executive powers has been found acceptable because it is so forthright that it invites no suspicion of dissembling. If the Lord Chancellor feels impelled to speak on a policy matter, he may do so frankly in Parliament and is not tempted to disguise a speech as a judicial opinion. He may satisfy any urge to improvise new remedies or make innovations in the law by sponsoring legislation instead of reaching that end through the fiction that he merely is construing a constitution or interpreting a statute.

In the United States, controversy as to the bounds of judicial lawmaking has persistently divided judicial, professional and public opinion. Many political leaders and large segments of our people, though of opposite schools at different times, urge a "judicial activism" to take the initiative in bringing about changes in fundamental law. On the other hand, Presidents Jefferson, Jackson and Lincoln each in his time complained that the Supreme Court was invading the legislative field. More recently, President Roosevelt stated his grievance to be that "The Court has been acting not as a judicial body, but as a policy-making body."

No one has proposed and, of course, no one can devise a formula that will insure judicious use of judicial power. Considering that the judicial office is the least representative in our system, that the litigation process is narrowed by serious limitations and that judicial power normally is exerted with retroactive effect, I should not suppose it open to doubt that overstepping or irresponsible use of judicial power is as much an evil as lawlessness in either of the other branches of government.

### How Can We Tell Judicial from Political Power?

However, since all interpretation is a making of decisional law, the question which underlies this old controversy is by what sign shall we know the limits of the power which is given to the courts as distinguished from political power not entrusted to them. Chief Justice Marshall for the Court penned this definition:

> . . . Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the Court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the Judge; always for the purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law.

But does this do much to tell the profession what concrete factors actually will shape the judgment on any reasonably debatable issue? At its least, and probably at its most, it is a pledge that decisions will be

reached so far as humanly possible by application of existing and ascertainable legal criteria and standards. Yet, as an advocate at the Supreme Court Bar in many constitutional cases, I never was able to determine what material would really be considered by the several Justices as controlling such issues.

And I am bound to admit that a decade of experience as a judge throws little more light on the problem. Nothing has more perplexed generations of conscientious judges than the search in juridical science, philosophy and practice for objective and impersonal criteria for solution of politicolegal questions put to our courts. Few judges like to be accused of acting from merely personal predilections. Yet, frequently that is the point of dissenting opinions. Confusion at the Bar and disagreement on the Bench usually begin in lack of an accepted system of weights and measures to mete out constitutional justice. Unfortunately, the conclusion of judges having the highest sense of professional responsibility is that the present state of our constitutional development provides no definitive principles of decision.

To recount possible sources of guidance is to remind us how inscrutable they all are. We start, of course, with the constitutional text. But if that makes the answer clear, there is no problem. It is the imprecise, obscure or ambiguous state of the text that raises the issue. So where do we go next?

In a private law case we would go to the common law, perhaps, which has served to steady the hand of generations of judges. For interpretations of public law we get a little, but only a little, help from it. While the compact is rooted in English legal philosophy and embodies many of its presuppositions, it is our doctrine that there has been no federal reception of the common law.

I suppose we would agree that the most lawyerly and appropriate source of guidance is any applicable decision by our predecessors. But for over a century it has been settled doctrine of the Supreme Court that the principle of *stare decisis* has only limited application in constitutional cases. It might be thought that if any law is to be stabilized by a court decision it logically should be the most fundamental of all law—that of the Constitution. But the years brought about a doctrine that such decisions must be tentative and subject to judicial cancellation if experience fails to verify them. The result is that constitutional precedents are accepted only at their current valuation and have a mortality rate almost as high as their authors.

Some earlier cases relied upon "natural justice" or the "laws of nature and of nature's God", which our Declaration of Independence invoked. But new schools of thought scorn that belief as a sort of legal superstition and propose, in the name of "realism", to rely upon "facts" to determine decisions. These they would select largely from sociology, political science, psychology and other nonlegal disciplines. Citations of weekly magazines, newspapers and an endless list of popular, scientific and professional books and reviews are now found in briefs and opinions. We need not enter the controversy between these schools, for this "realism" and "natural justice" have much in common; both shield the judge with an impersonal and probably unconscious camouflage for holdings that emerge out of the mists of preconception. Unfortunately, both also are alike in bewildering the profession and arousing suspicion that decisions may be reached from latent motives and policies not avowed.

### Standards of Constitutional Decision Are Soft and Transient

Thus we find standards of constitutional decision soft and transient. Judge Cardozo put it politely in saying that much turns "upon the social or juridical philosophies of the judges who constitute the Court at one time or another". Judge Learned Hand says as to many constitutional commands, "Nothing which by the utmost liberality can be called interpretation describes the process by which they must be applied." But he sees no remedy, because this condition is due to the generality of some of these rubrics, and adds: "Indeed, if law be a command for specific conduct, they are not law at all; they are cautionary warnings against the intemperance of faction and the first approaches of despotism."

These conclusions of experienced and disinterested jurists are significant, perhaps ominous, for the long future of our constitutional freedoms. Lord Acton spoke of liberty as "an idea of two hundred definitions". There is no such thing as an achieved liberty; like electricity, there can be no substantial storage and it must be generated as it is enjoyed, or the lights go out. If knowable and impersonal standards for ascertaining the scope of our liberties are lacking, constitutional law is almost as liquid as legislation, and we have little more of a written Constitution than does Great Britain. Can safeguards of this character be made steady and strong enough to withstand what Judge Hand calls "the intemperance of faction and the first approaches of despotism"? To answer, we must consider the momentum and potency of two distinguishable but closely related movements that hold some threat to our traditions.

One now is called authoritarianism, a new name for the old practice by which official authority, unconfined by law, rides roughshod over individual rights. Our forefathers sought to forestall this kind of oppression by providing that official actions affecting life, liberty and property be confined to those legislatively authorized and executed by procedures which confom to due process of law. Out of these texts have grown our many decisions that support the principle of individual freedom as opposed to the principle of authority.

But a more subtle form of aggression against individual freedom comes, not from the usurping officeholder, but from the state itself, under the philosophy that all else

must give way to the interests of the state. This movement is likely to progress strictly within the terms of legislation and forms of law. Government gradually takes over direction of the total life of the citizen—economic, educational, social, artistic and religious. It regulates each step of one's daily affairs and tolerates no conflicting loyalties or duties. In moderation, many may welcome this as a "planned economy" or "welfare state"; in excess, it becomes the totalitarian state. Our forefathers knew, too, the dangers of excessive government and sought to forestall it by confining the reach of the Federal Government to a small segment of the daily life of the individual or of the local community. It was to be a government of enumerated powers; and others, unless prohibited, "are reserved to the States respectively, or to the people".

It seems to me that these traditional freedoms are less in danger of any sudden overthrow than of being gradually bartered or traded for something else on which the people place a higher current value. In this anxiety-ridden time, many are ready to exchange some of their liberties for a real or fancied increase in security against external foes, internal betrayers or criminals. Others are eager to bargain away local controls for a federal subsidy. Many will give up individual rights for promise of collective advantages. The real question posed by the Fascist and Communist movements, which together have captivated a large part of the world's population, is whether, today, liberty is regarded by the masses of men as their most precious possession. Certainly in the minds of many foreign peoples our type of individual liberty has been outvalued by promises of social welfare and economic security, which they want too passionately to be critical of the price. If this indifference to traditional values should spread to us, it would be the greatest threat to our own liberties.

Measures of public welfare or security are apt to be demanded without considering that execution of each added function requires an incalculable number of detailed official decisions important to the property, welfare or perhaps the liberty of those affected. However, most are of small consequence to the general public and constitute routine, tiresome duties for often anonymous officials secure in their tenure and beyond the reach of aggrieved citizens. That among their multitude of acts are many careless or arbitrary ones we may be sure. Many of them are immune from judicial review, but the very mass of these decisions and their particularized character make review, even if allowed, sporadic, costly, superficial and largely futile. Thus, unless new safeguards are devised, an administration that is all-embracing will of necessity tend to become all-powerful. It will take considerable ingenuity and diligence to find techniques to extend the protection of individual rights to keep pace with the expansion of power. The Federal Tort Claims Act, to give remedies for injury from official negligence, and the Administrative Procedure Act, to assure more impartial administrative decisions, are examples of measures that may help to prevent government from becoming arbitrary and oppressive as it grows big.

It is said, by advocates of the expanding socialization, that it chiefly affects "property rights", as to which it is safe to let the legislators and administrators have their way so long as courts uncompromisingly protect "human rights". For purposes of that argument, it is assumed that our forefathers were absent-minded when the citizen's property, as well as his person, was assured due process of law. The longer I work with these problems the less certain I am that what they joined we can put asunder. My equal right to drive an automobile may be only a claim to use of property, but it concerns my personal freedom as well. Prohibition may be looked upon as no more than a regulation of a particular kind of property, but many took it as rather personal. If officers search my house and seize my papers, with

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no threat to my person, only property may be directly touched; but I can think of no greater affront to my person. But, even if we think property sometimes has had undue protection against regulation, the question remains, how far so-called rights of property can be swept away without encroaching upon rights of the person as well. Every foreign state that has deprived persons of fundamental "property rights" has eventually also taken away the rights of the person. Those who operate intensive state controls of property have found it necessary soon to take equally intensive state control of labor also. Compulsory service, heavy penalties for absenteeism, production quotas, and all the apparatus of the police state, ultimately are introduced upon the same arguments from state necessity that usher in more popular early measures.

I am not alarmed by any "clear and present danger" of this whole train of evils overtaking us in the United States. But in modern conditions, to identify and forestall the "first approaches of despotism" will take more insight and farsight than is afforded by catchwords or slogans carried over from eighteenth-century political struggles to settle twentieth-century constitutional cases. Again I tap the wisdom and experience of Judge Hand:

> . . . The answers to the questions which they raise demand the appraisal and balancing of human values which

there are no scales to weigh. Who can say whether the contributions of one group may not justify allowing it a preference? How far should the capable, the shrewd or the strong be allowed to exploit their powers? When does utterance go beyond persuasion and become only incitement? How far are children wards of the state so as to justify its intervention in their nurture? What limits should be imposed upon the right to inherit? Where does religious freedom end and moral obliquity begin? As to such questions one can sometimes say what effect a proposal will have in fact, just as one can foretell how much money a tax will raise and who will pay it. But when that is done, one has come only to the kernel of the matter, which is the choice between what will be gained and what will be lost.

Who, indeed, can peer far enough into the future to say whether more is to be gained than lost by sustaining a particular claim of liberty against that of authority? One is not always the antithesis of the other. Liberty is not self-supporting, but is the child of a just and stable legal order. An immunity which too far undermines government would be self-destructive, while today's infringement of liberty may purpose its long-range preservation. One of the paradoxes of our history is that the administration of Mr. Lincoln, most prolific in invasion of individual rights, is most commemorated for its over-all service to human liberty. It is especially difficult to judge between immediate loss and ultimate gain to liberty when there is an organized movement to make the rights of some a weapon to destroy the rights of all. A balance suitable to one time or condition may not be valid for others. Not every defeat of authority is a gain for individual freedom, nor every judicial rescue of a convict a victory for liberty.

What is the net gain if the liberty of one is sustained to the injury of another's? Can we avoid the logic that one man's right must end where another's right begins, and that any overextension of the rights of one group or individual will merely subtract from that of another?

Above all, who has a juridical formula to identify manifestations of "the intemperance of faction" from legitimate expressions of the will of the majority? The reconciliation of majority rule and minority rights involves the most debated theoretical problems in the philosophy of free government. Mr. Jefferson asked where else we may "find the origin of just powers, if not in the majority of the society? Will it be in the minority? Or in an individual of that minority?" Presumably we enforce rights of a minority which restrict the majority only because a one-time majority will established them. May later majorities rescind the grant?

Judge Cardozo reminds us that the words which express our great constitutional generalities "have a content and a significance that vary from age to age." If so, should judges apply them according to the understanding of the generation which promulgated them or according to their meaning to contemporaneous society? On this issue between the quick and the dead, Mr. Jefferson stood squarely on the proposition that "the earth belongs to the living generation . . . ." Followers in his political tradition therefore have insisted that courts abstain from frustration of the legislatively expressed will of the current majority, at least in all except the clearest cases of transgression of the Constitution's text. But those in the tradition of Marshall have put a high value on the original purpose and have accorded less weight to contemporary opinion.

The judge who would resolve uncertainties of interpretation by conscious deference to public opinion will find new pitfalls in his path. Is there any more reliable test of prevalence of a public opinion or will than the election returns? That certainly is its legal manifestation, and I see no reason to believe that judges have better understanding of it than those the public has elected to represent them. To the extent that public opinion of the hour is admitted to the process of constitutional interpretation, the basis for judicial review of legislative action disappears. If interpretation is not to be a mere following of election returns but a legal process, the utmost deference that courts can consciously pay to political trends is a strong, but rebuttable, presumption in favor of the constitutionality of action by the political branches.

Exclude as far as humanly possible the pressures of group opinion, but let us not deceive ourselves; long-sustained public opinion does influence the process of constitutional interpretation. Each new member of the ever-changing personnel of our courts brings to his task the assumptions and accustomed thought of a later period. The practical play of the forces of politics is such that judicial power has often delayed but never permanently defeated the persistent will of a substantial majority. Judicial review in practice therefore has proved less an obstacle to majority rule than the followers of Mr. Jefferson feared and less a guaranty of the *status quo* than the followers of Mr. Hamilton hoped.

But for all this, the responsibilities of the judges and lawyers for the preservation of our scheme of liberty under law is heavy, and failure will not be excused by the difficulties, weaknesses or uncertainties that I have pointed out in our process. We cannot escape the dangerously vague by resort to the dangerously rigid. But we must recognize the pliability of the process for what it is and strive to keep our liberty under law by keeping ourselves under law. The profession knows that the law is a progressive discipline and that each decision cannot be a mere copy of one that went before. It knows that the nature of our task gives much latitude to our judgment. But it also has an instinctive dislike for rootless or erratic decisions which it expects to be rewritten when the wind shifts to another quarter. It will be satisfied if our conclusions, fallible though they are and mistaken though they may be, represent a real respect and aspiration for law, a faithful effort to apply law and a veneration for the work of the great

minds that have made our legal structure the nearest to a safeguard of freedom that has been devised.

Whatever license of constitutional construction one group of judges may take in one direction a later group may take in an opposite direction, as they succeed to office from different political backgrounds and atmospheres. The changes brought about in the last score of years are some measure of those which a prolonged future regime could accomplish. Only the people themselves who make and unmake our political regimes can permanently guard their liberty. As Attorney General, speaking for the executive branch of government at the 150th Anniversary of the Supreme Court, I was moved to observe: "Judicial functions, as we have evolved them, can be discharged only in that kind of society which is willing to submit its conflicts to adjudication and to subordinate power to reason." That still is my conviction. In the wise and eloquent words of Chief Justice Hughes: "Whether that system shall continue does not rest with this Court but with the people who have created that system. As Chief Justice Marshall said: 'The people made the Constitution, and the people can unmake it. It is the creature of their will, and lives only by their will.' "

So I urge that the lawyer, as a leader of public opinion, can do no greater service to our institutions than to see that the people are repeatedly warned and kept everlastingly aware that they must be their own guardians of liberty and that they cannot thrust that whole task on a handful of judges.

We whose lives are dedicated to freedom under law add a fervent "Long live the Constitution."

## Southern Regional Meeting and Meeting of House

■ Plans are well advanced for the combined Southern Regional Meeting and the Mid-Year Meeting of the House of Delegates of the American Bar Association to be held at the Biltmore Hotel in Atlanta, March 3-10, 1954. More than 1500 lawyers, law teachers and judges and their wives from Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Tennessee and Kentucky will join in an unparalleled program of bar organization planning, shop talk, continuing legal education, inspiration and entertainment.

This gathering is being held in response to the popular demand that the national bar program be brought within the reach of all members of the profession. It will provide a forum where many lawyers heretofore inactive in the American Bar Association conveniently may come together and learn of its great objectives, enlist in its fine civic enterprises, and, in turn, receive the inspiration and the continuing education which mean so much in the life of a lawyer.

The South, noted for its hospitality and conviviality, is plainly aware of the compliment implied in the Association's decision to hold the first Mid-Year Meeting of its House of Delegates away from Chicago since 1937, in the City of Atlanta.

Those attending the Regional Meeting, together with the officers, the Board of Governors and the delegates from forty-eight states and three territories attending the House of Delegates meeting, will make this the greatest and most significant gathering of lawyers ever assembled below the Mason and Dixon line.

President Jameson will preside over the Regional Meeting and Chairman Maxwell will preside over the House of Delegates,—the sessions of the former commencing on the evening of March 3 and concluding March 6, after which the sessions of the latter will extend from March 6 to March 10.

The week's program and the meeting arrangements are being planned by lawyers from the ten Southern states under the General Chairmanship of E. Smythe Gambrell. Honorary Chairmen will be Robert B. Troutman, Hatton Lovejoy and John B. Harris.

Traditional Southern hospitality will be extended by the Georgia Bar Association, headed by President Edward A. Dutton; the Atlanta Bar Association, headed by President A. Walton Nall; and the Lawyers Club of Atlanta, headed by President E. D. Smith.

Stuart T. Saunders, Robert T. Barton, Jr., T. Justin Moore, Langhorne Jones, Egbert L. Haywood, James Thorpe, Zeb V. Norman, Walton J. McLeod, Jr., Samuel L. Price, E. Dixie Beggs, Cody Fowler, Horner C. Fisher, William Logan Martin, Henry Upson Sims, William H. Mitchell, John C. Satterfield, Jerome Hafter, Cuthbert S. Baldwin, LeDoux R. Provosty, Richard B. Montgomery, Jr., Charles G. Morgan, J. Malcolm Shull, Edward A. Dodd, Thomas B. McGregor and other leaders in the southern states will be active in the conduct of the meeting.

Several nationally known speakers have already accepted invitations to attend. Indications are that most of the Sections of the Association will have special programs. Interesting round table discussions on "bread and butter" topics are planned. Receptions, dances, fashion shows, guided tours, breakfasts, luncheons and dinners will provide the lighter side.

A letter outlining the program, with registration blank attached, will go out to lawyers of the ten states in the near future. Association members and nonmembers alike are invited.

# Reducing the Delay in Administrative Hearings: Suggestions for Officers and Counsel

**by E. Barrett Prettyman** • Judge of the United States Court of Appeals for the District of Columbia Circuit

■ With the creation of the President's Conference on Administrative Procedure, which held its initial meeting last spring, the first step was taken in the solution of a problem that has been growing increasingly worse for many years: the complexity, length and expense of federal administrative proceedings. Judge Prettyman, the Chairman, explains in the following pages how the Conference is attacking the problem. The article is taken from an address delivered at a joint breakfast meeting of the Section of Administrative Law and the Section of Judicial Administration at the Annual Meeting last August in Boston.

■ For years eminent private counsel have railed at Government hearing officers and trial attorneys for inordinate delays and inexcusably voluminous records in administrative adjudicatory proceedings. Conversely, for the same years and for the same reasons, Government hearing officers and trial attorneys have railed at eminent private counsel. There was much to be said on both sides.

The matter has increased in importance, importance to government, importance to the Bar, and importance to all manner of people in the workaday world. American business, industry, labor and government have become complicated. Their routine problems are complicated, and their disputes have become proportionately more complicated. Thus far the legal profession and the rules adopted by it have been the instruments in use for the solution of those disputes. Not too much difficulty is had with respect to lesser controversies. But it has become increasingly apparent that, in vast fields of the complex physical sciences and the economics in which business is now accustomed to operate, the time-honored processes of the judiciary and the administrative agencies alike creak and groan and all but stop entirely. To some this already spells abandonment of those processes and the substitution of new devices for adjudication. To me no such eventuality is necessary.

I say with emphasis that, if you imagine the American businessman or labor leader will forever put up with processes which do not function with the accuracy and expedition which he requires for his working purposes, you credit him with less ingenuity and independence than I do. He will not continue to pay a hundred thousand dollars for a product he knows is worth only ten thousand, or repeatedly wait years for a decision he knows could be reached in weeks, or indefinitely permit disputed issues to be buried in an ocean sand of irrelevancies and thus lost instead of being decided. I know of no reason why he should do so. But I hold to two basic beliefs: (1) that open hearings of adversaries, fact-findings upon open records, and disposition upon facts thus found are not to be improved upon in the ultimate public interest by an autocracy however benign, or by any other method presently conceived of; and (2) that American lawyers, public and private, are no less ingenious than are their brethren in other worlds and when aroused can design procedures which will produce efficiency without abandoning fundamentals. As I see it the legal profession still has ample opportunity, but the time is rapidly coming when it must fish or cut bait and go ashore.

One more brief preliminary note: We are not here discussing the run-of-mine proceeding which consumes a day or so—or even a week—and a few hundred pages and dollars. We are attacking the problem of the disputes, few in number, which run into the thousands of hours, dollars and pages, which tie up whole sections of personnel, public and private, which by their own physical cumbersomeness and complexity make accuracy almost impossible, and which are so important in their issues that the results are truly vital not in substantive law but in earthy practicalities.

In the year 1949 the subject came to the attention of the Judicial Conference of the United States. As is the established custom in these matters, the Conference appointed a Committee, the Committee suggested an Advisory Committee, the Advisory Committee reported to the Committee, the Committee reported to the Conference, and the Conference recommended that the President of the United States call a conference. He did so.

### President's Conference Is a New Experiment

The President's Conference is a new experiment in government. Investigating committees, exploratory commissions, expert organizations, boards of inquiry, and panels of learned inquisitors have existed galore. They have examined, recommended and passed on. Never before has a President called together representatives of every agency having a given function and told them to examine their own shortcomings, exchange experiences and figure out some answers. Fifty-six Government departments, bureaus and agencies named delegates. The President included twelve attorneys from private practice to add tartness to the flavor and three federal judges for leaven. The seventy-one members constitute a sort of legislative assembly, a mass of self-analysis.

The President's Conference met and promptly disintegrated itself into committees, ten of them. Besides the Organization Committee, they were Pretrial, Pleadings, Evidence, Trial Problems, Hearing Officers, Judicial Review, Administrative Office, Uniform Rules, and a Committee on Style. In these ten separate segments the Conference set to work. Thus far every committee has had not less than two meetings, has its research well under way, its work program crystallizing. The next plenary meeting of the Conference will be November 16.

The immediate objective is to produce a set of recommendations, concise and concentrated, which will point the way toward lessening unnecessary delay, expense, and volume of record in long and complicated administrative proceedings. Having been delivered of this progeny the Conference will recess, relax, watch what happens, and then no doubt in due course meet again.

To my way of thinking, major betterment, perhaps complete cure, for the difficulty under consideration can be achieved by two simple remedies. The first is to require that a case be organized before it is put to trial. The American businessman has a dramatic capacity for organization. He organizes economically and he organizes physically. It never occurs to him that he could accomplish a major task without organization. It would not occur to him to build a fifteen or a fifty million dollar building without such complete plans in advance that he knows how much the roof will weigh before he pours his first footing. He would never suppose for a moment that he could manufacture a hundred thousand automobiles and show a profit unless he first was assured of an assembly line and a steady pouring of materials into it. They do not move a big-top circus from one town to the next by haphazard activation of each moment's notion. Baseball has a name for the difference between the professionals and the sandlotters; it is "organized". And the American lawyer often assists and even instigates these measures of prearrangement. But when it comes to their own field of operation, these men of our profession all too often fail to give planning much thought.

A building would collapse, a manufacturer would go broke, circus animals would starve to death and baseball would be merely another riot if the preliminary patterns of these performances resembled the advance trial organization of many a major lawsuit. We like to think of a trial as a contest. The lawyer, we fondly dream, is a doughty warrior striding forth unafraid to do battle in an arena of books and tables, or he is a great commander on horseback flashing by, shouting crisp orders, the sparks of his inherent genius to dashing couriers. The tide of battle ebbs and flows, and he tosses into the conflict his surprise shock troops to win the day. All this is heroic and dramatic. The trouble with it is that it is out of date.

Military men no longer deliberately risk major decisions upon momentary inspirations, unless they are absolutely compelled to do so. Commanding generals no longer put great armies into the same field together and let them push each other around for a couple of days. The D-Day landing and the return to Leyte were not movements which happened to occur the previous evening to General Eisenhower and General MacArthur. Weary days upon weary days went into the organization of these events. The modern army is an unbelievable mesh of organization. The military men have a name for the supply part of their task of preparation—"logistics". It is the science of putting the needed kinds and amounts of men and matériel at the right spot at precisely the right moment. If "contest" is the right simile for the trial of a lawsuit, we ought to try the big ones in a modern manner. We should have legal logistics; organization of men and material ought to supplant inspiration and histrionics. There is ample room within the boundaries of a well-organized engagement for the exercise of tactical genius. Bradley and Patton had plenty of opportunity and made use of it. So it is with a major lawsuit. Organization does not nullify but rather makes possible courtroom maneuvers, if lawyers insist upon them.

Of course my sweeping assertions of lack of organization in our legal combats are not universally applicable. Many a present-day lawyer organizes for a major encounter as meticulously and thoroughly as does his contemporary in business or in military service. The point is that we do not require all trial lawyers in major lawsuits to do so. We ought to require it. We should not permit a trial to begin until organization for it is complete. Those trials in which adequate organization has been perfected are trials in which there is

little, if any, unnecessary delay, expense, or volume of record.

What do we mean by organization for a lawsuit? I remind you that we are speaking of "The Big Case", not the two- or three-day affairs of small elements. Every major lawsuit involves numbers of issues, large and small, many documents, much testimonial material, and a large number of people, including usually a goodly number of lawyers. To proceed to the task of finding disputed facts by letting each participant act in the fashion which seems best to him at each particular moment is folly in its rawest form. Aimless meandering in a courtroom, like aimless meandering in an automobile, without map, compass, route or direction, is the costliest and least certain of all point-to-point traveling. It's all right if you don't care about getting anywhere. But if you have a known destination you'd better organize your movement.

The physical material of a trial ought to be completely organized—segregated, copied, counted, numbered, labeled and arranged. The program of procedure ought to be organized—where, when, how, by whom. The participants ought to be organized—who leads, who keeps records, who examines, who cross-examines, who does research, who argues, who does each task which must be done. The presentation of witnesses ought to be organized. Every foreseeable point of law ought to be briefed. The final argument ought to be in draft before the opening statement is made. The intended ultimate proposal of findings of fact ought to be the guide for the presentation of testimony. A completely organized case proceeding to trial is a joy to behold.

The first general remedy for the prevention of unnecessary delay, expense and volume of record in the trial of major disputes is a requirement that such a case be not permitted to go to a hearing until it has been completely organized for trial.

The second one is the elimination of the unnecessary. I know of no reason why the irrelevant or the immaterial should be admitted to the record in an adjudicatory proceeding. An investigation is a totally different process and ought to be sharply distinguished. An adjudication means a disposition of rights, final and enforceable. Its major essential is accuracy. It ought to be as economical as the nature of the subject matter permits. Evidence ought to be limited to that which relates to the issues in dispute and which assists to some noticeable degree in progress toward a decision. Cross-examination without discernible or definable purpose ought to be curtailed. The merely cumulative ought to be denied admission. Repetition ought to be forbidden. The great masses of documentary material which frequently underlie an evidentiary opinion or a conclusion of fact ought to be exhibited, but not put bodily into the record unless this material is itself in dispute.

That monstrosity of administrative proceeding, the "exhibit by reference", consisting of whole records in other cases, ought to be relegated to a museum of extinct legalisms. No rational basis exists for the recording or transcription of arguments on points of law. Grounds for such points ought to be shown, but the stenographic reproduction of the long, oral wrestlings of counsel serves no purpose. A whole book or document ought not to be accepted as an exhibit when only one page or paragraph is pertinent.

In short, only that which is helpful in a discernible manner and amount toward a decision of the disputes being tried ought to be permitted a place in the record. Somebody says that this would be a revolutionary change in the generally accepted characteristics of administrative proceedings. My reply is that when a malady besets a useful organ the date of the discovery of a known cure is immaterial. The potency of the treatment and its freedom from adverse side effects are the only sensible queries. It would not perturb me if the scientists were to find a startling, radical cure for cancer in

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Chairman of the President's Conference on Administrative Procedure

the field of chemical maladjustment rather than in the now orthodox realms of research in bacteria and virus infection.

A friend of mine recently said over the luncheon table, in substance, "Barrett, what do you think can be accomplished in this administrative procedure business?" I replied, "Plenty." He said, "Name one." I said, "I'll name ten." The challenge and the task were for me to be specific. I shall do so here and now. In the doing I shall mention nothing which has not been suggested elsewhere. All these items are already on the agenda of the Conference. As a matter of fact, in the first draft of this paper, I had half again the promised ten.

The first two steps I list are themselves means for achieving other more specific changes.

1. Establish and use the pretrial conference as a method of achieving pretrial organization and many precise improvements in trial technique. This is one of the keys to major accomplishment in this matter. The Conference Committee on Pretrial, under its Chairman, Commissioner Doerfer, has already made tremendous progress, not merely in the theoretical stages of ideas but in the practical field of experimentation.

2. Either give hearing officers autonomous authority or establish quick, easy intercommunication be-

tween them and their agencies or some designated agency members, so that interlocutory rulings and orders can become positive and fixed without delay. This is another of the major keys to accomplishment in the problem before us. The atmosphere of the hearing room ought in each of the procedural steps to be one of certainty and progress and not one of contingency and doubt. The hearing before the agency is one proceeding, not a series of separate proceedings, part original and part appellate. It is a known fact that much of the leniency of hearing officers towards trial counsel comes from timidity toward reversal or rebuke by the agency for which the examiner sits. This may be a tough nut to crack, but, if the agencies have a will to do so, the status of the hearing officer and the significance of his procedural rulings can be worked out in such fashion that the hearing officer can deal with his problems with confidence and so with courage. Every student of legal procedure knows that the competence and the conduct of the hearing officer are the determining factors in trial efficiency. A high degree of excellence in both is an absolute and indispensable essential. Without it no hope exists for improvement in the administrative process, or even for its continued usefulness. Earl W. Kintner, the new General Counsel of the Federal Trade Commission, heads the Conference work on this problem.

3. Refuse to open a hearing until the issues to be tried are so crystallized as to be understood by all parties concerned and are in triable form. The negatives implicit in that statement are more important than the affirmatives. It rules out fishing expeditions and merely investigatory ventures. It brings the contestants to the starting point not merely ready to start, but ready to go to the finish. Of course, sometimes, defense must be predicated upon proof rather than upon pleading, and rebuttal depends upon defense proof. We are not talking about that. We are talking about pleadings which, instead of saying that *A* punched *B* in the nose, say that *A* did, on or about the fifteenth day of May in the year Nineteen Hundred and Fifty-Three, lay hands upon, assault, batter, bruise, mayhem, wound, strike, cause contusions upon, subject to trauma, beat, punch, injure, upset, confuse, annoy, make nervous, raise welts upon, discolor, induce swellings upon, wallop, hit, hammer, hook, jab, and otherwise inconvenience, incommode, disconcert and disturb the body of *B*, or of some other person unknown, by placing on, about, around, upon, near or at the forward proboscis or some other anatomical portion of the body of the said *B*, or such other unknown person, his right digital assembly while folded, or some other weapon, instrument or thing corporeal or incorporeal but unknown. The subject is in the capable hands of a committee headed by the delegate representing the Treasury Department, Mr. Allison Rupert.

4. Apply to the presentation of direct evidence, both documentary and oral, strict rules of relevancy and materiality. In these cases the relevant and material data are wellnigh overwhelming. To open the record to the irrelevant and the immaterial is gross folly. Rules as to competency are something else. The problems of evidence have been assigned to a committee under the leadership of the General Counsel to the Civil Aeronautics Board, Emory T. Nunnely.

5. Restrict cross-examination to reasonable limits. Of course cross-examination has its useful purposes, and of course the right to it is a substantive right and a part of our concept of a fair trial. But the right is as much abused as it is used. All too often lawyers seem to think it essential to demonstration of their virility that they cross-examine every adverse witness. I sometimes think these lawyers read too many storybooks. It may be sad news to them, but the instances in which cross-examination has wrecked a competent witness are few indeed, especially in administrative proceedings and, moreover, it is a fact that the best weapon with which to destroy hurtful evidence is a good capable witness in rebuttal.

More often than not a so-called cross-examination is no more than a tedious repetition of testimony on direct, or an exhausting effort by the witness to explain elementary principles to stubborn counsel. A lawyer told me recently that adverse counsel in an administrative hearing in which he was engaged cross-examined a witness on a single subject for thirty-six trial days. Whether such tactics are part of a deliberate program of dilatoriness or the result of stupidity, they ought not to be allowed. The right of a hearing officer to restrict cross-examination to reasonable limits is as well established as is the right to cross-examination.

6. When a scientific fact is in issue, arrange for the opposing experts to confer privately and informally before they take the stand. The tendency of such a conference is to dispense with much of the scrambling about and the gobbledygook so familiar in such testimony when freshly presented through lay interpreters, to wit, lawyers.

7. Require that a current index be kept of the record in every extended hearing. The weeks and months otherwise spent in the preparation of findings can be shortened to hours and days by this simple device. There is no time lag, either in the hearing room or afterward, in searching for record references or in establishing the reliability of recollection, if an index—not, mind you, a digest—of the record is at hand. And the potential degree of accuracy in the final results of a protracted inquiry can be multiplied by its use. This and other trial problems are the assignments of a committee headed by Edmund L. Jones, of the Washington Bar, who has spent a long lifetime in court or administrative hearing rooms.

8. Prohibit deliberately dilatory tactics. I know that this is as hard to do as it is easy to say. And I doubt that there are many such occasions or

that many examples need be made. But some day an appellate court may establish that a party subjected to the expense and difficulty of an inordinately protracted hearing deliberately designed to wear him out has not had a trial which was fair in the requisite sense. And then too there are the possibilities of contempt proceedings and also the very simple one of putting the power somewhere to impose costs and damages upon the offending party in such a case. All these are extreme, of course; more extreme, probably, than ever will be needed. But they are handy gadgets to know about in case they are needed.

I used to think that the inexplicable delays and expense we hear about were due to the incompetence of counsel, to lack of craftsmanship in trial. But the unanimous testimony of members of the Bar, inside and outside the Government, to whom I have talked about the subject is to the contrary. They all say that the wily lawyer with a weak case is the fellow who creates all possible confusion so as to delay to the bitter utmost the inevitable bad tidings. An unwarranted prolongation of the proceedings seems to be in truth a hallmark of conscious weakness.

9. Cut records on judicial review to those portions necessary to the review. This seems such a simple thing, and yet so little has been done about it. A number of practical steps toward minimizing this appellate delay and expense have already been made and some experiments conducted with astonishing results. Lambert McAllister, chairman of that committee of the Conference, has Judge Soper on his committee and so will have a direct line of communication with the circuit courts.

10. Create an office of administrator of the executive agencies having adjudicatory functions, and give him the job, *inter alia*, of collecting and publishing data upon the work of the agencies, such as case load, time requirements, customary chronology of steps, time lags, and the like. This is no panacea, as we all know, but it is a powerful tonic. John A. Danaher, of Connecticut, heads this committee.

I should not close this summary chronicle of Conference programs without mentioning the study of the feasibility of uniform rules which is being made by a committee directed by former Governor Thomas J. Herbert, presently Chairman of the Subversive Activities Control Board. The potential results are as yet not known.

None of the foregoing is spectacular. None of it is text for moralizing. Its accomplishment will not inspire sonnets or cause bronze plaques to be cast. As a matter of fact, not a newspaper in Washington carried one line about the meeting of the Conference. But the administration of justice consists of more than sobbing and sermonizing. There are tangible involvements, such as time and money, and the practical effects of a decision, such as a job or a property or a right, and these depend in no small measure upon professional craftsmanship. In a fight before an administrative agency even the sad underdog, whose welfare is the object of so much of our solicitude and who models so much of our do-good publicity, would prefer to have at his counsel table a tough and wily workman adept at the realities of combat rather than a dewy-eyed phrasemaker skilled in making pretty sounds. Cement and red-hot rivets are essentials to a building, and skillful handling of those prosaic materials is requisite to a sound structure.

There is in our family a recitation in verse which has become a tradition. My grandfather taught it to my father and he to me and I to my son. The concluding stanza, summarizing the whole of many, runs this way:

> If you who hear this simple tale
> Would pray for the poor and, praying, prevail,
> Pray for peace and grace and heavenly food
> And wisdom and guidance, for all these are good;
> But don't forget the potatoes.

If all the plans of the President's Conference are commonplaces, I remind you that plowing, planting, fertilizing, cultivating and digging up the harvest are commonplaces of the sweatiest type, but they make up the production of that upon which so much of the world lives.

Now a word in conclusion as to the part of this Association—and particularly of this Administrative Law Section—in all this. You have a vital part. While the President's Conference is primarily the concern of the Government agencies, he placed part of the responsibility squarely upon the Bar and the Bench And a past President of the American Bar Association, George M. Morris, is Vice Chairman of the Conference. I know the natural skepticism of lawyers toward alleged improvements. I know, too, other sources of reluctance on their part. A lawyer in Washington was recently complaining long and loud over a proceeding which was in its hundredth day when it should have been completed in ten. A friend said to him, "Paul, what are you squawking about? Your meter is down." But, although these attitudes are natural and well known, I know too that when needs of the administration of justice become known, the Bar arises with skill and vigor. I have suggested some selfish reasons for an active interest in the matter at hand. To make the plea complete I have only to mention that a public interest in the rule of law is also involved. There is ample opportunity for your participation in this venture. Representatives of the Bar are on every committee of the Conference. A considerable corps of consultants is to be named. You can initiate projects for study, assist in the research and add your judgment to the intensive considerations of members of the Conference. To say that you can is, I am sure, equivalent to saying that you will.

# Social Security and Self-Employed Lawyers:

# A Plea for Re-evaluation

**by Arthur Larson** • Dean of the University of Pittsburgh Law School

■ President Eisenhower's proposal to extend the Social Security Act so as to bring self-employed workers, including lawyers, within the protection of the system, has received support from many sides. At the recent Annual Meeting in Boston, the House of Delegates refused to adopt a resolution reaffirming its previous stand against coverage of lawyers by Social Security and referred the matter back to the Standing Committee on Unemployment and Social Security for further study. Dean Larson approaches the subject from two points of view: the lawyers' self-interest and the public interest, both of which, he argues, are served by including lawyers within the provisions of the Act.

■ The controversy on Social Security Act coverage for self-employed lawyers has taken a new turn and has acquired a new urgency.

Last summer, shortly before the American Bar Association Annual Meeting in Boston, President Eisenhower transmitted to Congress for its consideration a plan which would bring within the Social Security Act not only self-employed lawyers, but also most other self-employed persons, such as doctors, architects, professional engineers and farm proprietors. Passage was recommended by the Department of Health, Education and Welfare, on the strength of a Report to the Secretary, prepared by a group of Consultants on Social Security.[1] This group was headed by a vice president of the Metropolitan Life Insurance Company, and included, among others, several corporation officers and one lawyer. In addition, the Chamber of Commerce of the United States has for some time been urging extension of coverage to all classes now excluded.[2]

The point is this: The proposal for extension of social security to lawyers is now coming from a direction that certainly cannot be characterized as left-wing or Fair-Deal or socialistic. Moreover, it comes with some urgency, because it is the Administration's first implementation of a widely-publicized campaign promise to extend and improve Social Security. And, for the first time, it comes in a plan which does not isolate lawyers for separate consideration, but treats them as a part of the broader problem of achieving final completeness[3] of coverage in one all-inclusive stroke.

The changing atmosphere of the controversy is also discernible in the action taken at the 1953 Annual Meeting. The Standing Committee on Unemployment and Social Security, in its report, recommended reaffirmation of the position taken in 1950[4] opposing any legislation which would bring self-employed practicing lawyers within the coverage of the Social Security Program.[5] The House of Delegates, however, referred the matter back to the Committee for further study. On the other hand, an attempt to get a resolution in favor of social security inclusion passed by the Assembly was defeated, on the recommendation of the Committee on Resolutions. The reason advanced by the Resolutions Committee was that the membership should await the results of the further study being undertaken. All this seems to indicate a shift from an attitude of settled opposition to one of continued inquiry—a commendable shift, in view of the complexity of the subject and the importance of its im-

1. A Report to The Secretary of Health, Education and Welfare, on Extension of Old-Age and Survivors Insurance to Additional Groups of Current Workers, by the Consultants on Social Security, transmitted June 24, 1953.

2. See e. g., American Economic Security, Volume X, Number 3, published by the Chamber of Commerce of the United States, Washington, D. C.

3. There are still, and probably always will be, a few minor omissions: students working for schools, services within a family, employees of foreign governments or international organizations, alien residents working for U. S. employers in foreign countries, and newsboys under age 18.

4. 75 A. B. A. Rep. 405 (1950).

5. Advance Program, 1953 Annual Meeting, page 68. The official position of the American Medical Association has also been one of consistent opposition to such a move; this position was reaffirmed by an A. M. A. spokesman shortly after the President's message. A poll of dentists, reported in detail by Edward B. Love at 38 A. B. A. J. 543 (1952), showed a majority opposed to inclusion.

pact on the everyday lives of lawyers.[6]

Do most lawyers want social security coverage? On this, the simplest fact question of all in the sense that it could be answered by a Gallup-type poll, there is the sharpest disagreement. The 1953 report of the Committe on Unemployment and Social Security expresses the opinion that "the great majority of the informed lawyers" oppose the move, while recognizing that some state and local bar associations have reached a different conclusion.[7] In 1952, the Committee tried to arouse interest in a sampling of opinion by a set of questions printed with its report, but obtained a very small number of replies, about equally divided pro and con. Speakers during the Assembly debate quoted figures from two states, Massachusetts and New Jersey. In Massachusetts, a sampling taken by Senator Lodge was said to have shown a 25-to-1 majority favoring inclusion; and an inquiry conducted by the *Newark Law Journal* was reported to have elicited 640 replies, of which 592 were favorable to coverage. A recent poll taken by the State Bar of Michigan showed 2,825 favoring inclusion and 1,395 opposed. Presumably one of the tasks of the Committee will be to try to clear up this elementary question of preference.

### Costs and Benefits

As to the merits of the proposal: There are two ways to look at it, first, from the point of view of self-interest, and, second, from the point of view of the public interest. It is only natural that the first should absorb most of the discussion, but the second must not be slighted by a group which holds the standing and responsibility of the legal profession.

The pure "what's-in-it-for-me" arguments have had a pretty thorough airing by now, but a brief summary may be useful. The self-employed tax cost is now 2¼ per cent of earnings up to $3600 a year. If we assume that most lawyers will for most of their lives be at or above this maximum, we can readily calculate some of the costs and benefits. The current tax would be $81 a year. Next year it will rise to 3 per cent, or $108. Under the Administration's plan, the biggest bargain will fall to those now nearing retirement. The plan does not have a "new start" provision like that in the 1950 amendments, but contains something serving a roughly similar purpose. This is a provision that, in calculating average monthly wage, the three years in which covered earnings were lowest or were nonexistent may be disregarded. However, covered wages for a minimum of two years must be used in the computation. Suppose a lawyer (the proposal having been adopted) started covered employment on January 1, 1954, and retired on January 1, 1957, having earned at least $3600 during each of the three years. He would have fully insured status under the present test, since half the quarters since January 1, 1951, were in covered employment. But in calculating his average monthly wage, he would be entitled to disregard 1951, 1952 and 1953. His average would therefore be the maximum of $300 a month.

His benefit, if he is single, would be $85 a month for life; if he is married and his wife is over 65, it would be $127.50 per month. At age 65, since life expectancy is about twelve years, the present value of an annuity paying $85 a month is approximately $10,000, and of one paying $127.50 the value is $15,000. The total cost to him would have been three times $108, or $324. The retired man with a wife over 65 would thus get $46 for every $1 of tax contribution.

This is, of course, a strictly transitional and temporary situation, but, while we are on the subject of self-interest, we may as well recognize that lawyers who are now in middle age and beyond are being offered quite a bargain.

### Survivor Benefits Are More Important to Younger Lawyers

For young lawyers, the survivor benefits will seem of more present importance than a retirement income thirty or forty years distant. Suppose a lawyer comes within the system on January 1, 1954, at age 25, earns at least $3600 a year until January 1, 1957, and then dies, leaving a wife and two small children. His widow and children will immediately begin to draw an income of $168.75 during the minority of the two children. This differs from ordinary life insurance in that payments terminate when the children reach age 18, but it takes care of the period when insurance protection is most needed. It also takes care of another critical period for the widow—the period when she is over 65 and has small prospect of remarrying or obtaining employment.

In the long run, since the system when fully matured is designed to be approximately self-supporting, contributors on the average will get out of it about what they put in, and there will be no such dramatic returns of $46 for $1 as now accrue to late-starters. The self-employed rate of contribution, under the 1950 amendments, is supposed to go up to 3¾ per cent in 1960, to 4½ per cent in 1965, and to 4⅞ per cent in 1970, where it will remain thereafter. Of course, no one can predict whether these rates will really survive. They have already been changed twice from the original 1935 figures, and may well be changed again in the light of further experience. There is a definite possibility that the maximum earnings figure to which both the contribution and benefit percentages are applied may be raised above the present $3600 a year. President Truman recommended raising it to $4800, and there is some support for putting it as high as $6000. While this would appreciably increase the taxes of the self-employed lawyer, it would also bring his benefits to a point much nearer his requirements, particularly if, as has also been proposed, the per-

6. The Standing Committee on Unemployment and Social Security, Allen L. Oliver, Chairman, has, of course, done a tremendous amount of work on this topic, but members of the Association generally have taken surprisingly little interest in the problem. Op. cit. note 5, page 68.

7. Op. cit. note 5, page 70.

centage applied to earnings above the first $100 a month should be increased from 15 per cent to 20 per cent. (The present formula is 55 per cent of the first $100 a month, and 15 per cent of the next $200.) With a $6,000 maximum, and a 20 per cent figure applied to earnings over $100 a month, a man with covered earnings averaging $6000 a year would, if he had a wife over 65, be able to draw on retirement $202.50 per month, instead of the present $127.50. This is calculated by taking 55 per cent of the first $100 of earnings, as at present, and then the proposed 20 per cent of the next $400, and adding to this figure the 50 per cent increase for a wife over 65.

If self-employed professional men were included in the Act, they would be quite justified in urging that modifications be made in the benefit rates to bring benefits up to a point somewhere near what they would regard as a worthwhile pension. However, the increase in the maximum earnings figure to $4800 or $6000 should not be accepted without a simultaneous increase of the percentage figure applied to earnings over $100. The reason is that the formula is already heavily weighted in favor of low-income workers, by taking 55 per cent of the first $100 and only 15 per cent of the next $200. If the flat contribution rate were applied up to $6000 with no change in the benefit formula, the result would be that the ratio of higher-income benefits to contributions would become more unfavorable than it already is.

The extension of coverage to all classes would to some extent offset this disproportion, because in many instances people are being paid at the 55 per cent rate not because they really have earned only $100 a month, but because they have been in and out of covered employment. This may be shown by an illustration. Suppose a lawyer (under present provisions) worked from January, 1951, to January, 1953, on a self-employed basis, earning $500 a month. Then suppose he worked from January, 1953, to January, 1955, as a salaried employee of a law firm for $200 a month, and retired in January, 1955. In calculating his average monthly wage, his total earnings in covered employment are taken ($4800) and divided by the number of months elapsed since January, 1951 (48). The result is $100 a month. He therefore is given a pension at the full 55 per cent ratio designed for lowest-wage groups, or $55 a month, although his actual average wage was $350 a month—well above the maximum for highest-wage groups. If coverage is made complete, this in-and-out situation will no longer occur in any fields of employment, and the result will be a lessening of the redistribution between high-wage and low-wage groups.

### Arguments Against Social Security for Self-Employed Lawyers

The arguments against inclusion of lawyers stress the theme that a self-employed lawyer's retirement problem is different from that of most occupations now under the Act. On close examination, some of the differences prove to be smaller than might at first appear.

First, it is sometimes said or assumed that the self-employed lawyer's general income level is such that he does not need the kind of minimal protection given by Social Security. There may be here some inclination to lose sight of the large number of individual practitioners in small towns and rural areas whose voices are seldom heard in discussions of this kind. According to the Department of Commerce figures for 1947, 73.6 per cent of the country's self-employed lawyers were in individual practice, and this group had a mean net income of $5,759, and a median net income of $4,275, after office expenses but *before federal income tax*. Obviously, this group needs ordinary Social Security in the same way that most wage and salary earners do.

A second difference urged, and one which has received much stress, is the probability that lawyers will continue after 65 to earn enough from their profession to disqualify them for social security pensions. The present rule is that benefits are not payable if the self-employed insured earns over $900 per year in covered employment. Two observations may be made. The first is that the three fourths of self-employed lawyers who are practicing alone and clearing only a few thousand dollars after taxes are less likely to be in this position than the members of larger firms whose interest in the firm will continue to provide an income even when the member himself becomes relatively inactive. The other observation is that the difference becomes less impressive when it is remembered that the average retirement age of persons presently under Social Security is not 65, but almost 69. The proportion of people between 65 and 70 now working is 60 per cent; the proportion between 70 and 75 is 40 per cent. After age 75 the earnings disqualification becomes inapplicable. So if a considerable

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number of lawyers do go on working and earning after 65, and thereby for a time waive their benefits, this does not make them a distinctive group.

A third difference is said to be the fact that present benefit rates would be too low to be of much value to a lawyer. This again seems to lose sight of the three-fourths who average perhaps something over four thousand a year after taxes. But, in any case, the benefit structure is not beyond alteration, and, as suggested above, professional men if included would be justified in asking a revision of the benefit formula to bring the maximum man-and-wife benefit up as high as $200 a month.

The conclusion usually drawn from these arguments is that self-employed lawyers should have a retirement plan tailored to their special circumstances and needs, in the form of a tax deduction for limited amounts set aside each year in some systematic and formal pension program. Plans of this kind have received considerable discussion in this JOURNAL[8]. Their merits have been well presented and will not be reviewed here, since this article is concerned exclusively with what the self-employed lawyer's attitude should be toward the specific proposal now before Congress to bring him and almost everyone else within the Act. It need only be stressed here that the two approaches are not mutually exclusive. The writer agrees with the position of Harold O. Love when he suggests that the ideal solution would be to have social security coverage *plus* the tax deduction for retirement savings.[9] This conclusion is re-enforced by the analogy most often used by proponents of the tax deduction for lawyers. They say that the lawyer should be allowed to build up his own pension as a corporate executive now is allowed to do. What they overlook is that the corporate executive is also under the Social Security Act; and that to give complete effect to the analogy they should favor social security coverage plus the tax deduction, with the latter serving the supplementary function now performed by the more than 20,000 private employee pension plans receiving favored tax treatment.[10]

### The Lodge Bill Provides for Individual Election

In the 1952 report of the Standing Committee on Unemployment and Social Security, there is a concise and scrupulously fair summary of the arguments for and against social security coverage which should be reviewed by all lawyers.[11] This Committee had before it various bills,[12] but, of course, not the all-inclusive plan recently sent to Congress by President Eisenhower. Among the bills discussed, S. 2481 was prominent. It was introduced by Senator Lodge, and was the first to provide for individual election of coverage by lawyers. The principle of individual election, in the writer's opinion, is so foreign to the spirit and purpose of the social security program that such a proposal will probably never have a serious chance of passage. As the Committee recognizes, it permits "adverse selection against the system". In simplest terms, this means that the man who stands to get $15,000 for $324 will certainly elect coverage, while the man who has forty years of rising contributions to look forward to may elect to stay out. All other members of the system would certainly object to this discriminatory privilege of election. The only election now permitted, as for educational and charitable organizations, is not individual but institutional, and even this was thought advisable for legal or policy reasons not present in the case of lawyers.

One final self-interest argument may be mentioned. As matters now stand, a salaried lawyer can work until age 65, then go into self-employment; and because his self-employment earnings are not relevant to the $75 limit (which applies only to covered employment) he can keep both his social security pension and his self-employment earnings. If such self-employment became covered employment, this tempting loophole would be plugged. In any public discussion of the present issue, the less said about this argument the better. It is at best an argument unworthy of the profession, since the spirit and purpose of the act certainly never contemplated the payment of benefits to people who were not "retired". For purely administrative reasons, the $75 test had to be confined to covered employment, since the records of such earnings automatically come to the Social Security Administration. If all earnings were relevant, a means test resembling that for public assistance would be necessary, and that is precisely what social insurance was invented to get away from.

### The Effect on Public Interest

So much for self-interest. We still have to consider the effect on the public interest. We must do this for two reasons. One is that the success or failure of our social insurance program, and the form it takes in the future, will have a more profound bearing on our economic system and our national and individual character than any other domestic issue. Another is that, whether we like it or not, the action of Congress on the pending proposal will depend more on broad considerations of the value of universal coverage than on piecemeal arguments by individual professions on how the plan affects naturopaths, morticians, or certified public accountants. We must therefore understand and weigh those broad considerations.

*(Continued on page 1022)*

8. Several of the most recent are: Harold O. Love, "Social Security and Retirement Plan for Lawyers", 38 A. B. A. J. 463 (1952); Nicholson, "Pensions for Partners: Tax Laws Are Unfair to Lawyers and Firms", (1947) 33 A. B. A. J. 302; Rudnick, "More About Pensions for Partners", 33 A. B. A. J. 1001 (1947); Edward B. Love, "Social Security and Retired Benefits Revisited", 38 A. B. A. J. 543 (1952).

9. Op. cit. note 8 *supra*.

10. Additional plans have been coming in at the rate of about 400 a month. It is estimated that 40 per cent of the country's employees are now covered by registered plans.

11. (1952) 77 A. B. A. Rep. 277.

12. See also their 1953 report, note 5 *supra*, containing a good summary of all the bills that have been introduced that might affect lawyers specifically or that provide for general expansion of O. A. S. I. coverage.

# Cornerstone for Bar Center Will Be Laid November 2

▪ Distinguished members of the Bench and Bar in the United States will participate in ceremonies Monday, November 2, incident to the laying of the cornerstone of the new American Bar Center in Chicago.

Mr. Justice Robert H. Jackson of the United States Supreme Court has accepted the invitation of the American Bar Foundation to be the principal speaker. President William J. Jameson of the American Bar Association will preside, and former President Robert G. Storey will speak briefly outlining the purposes and objectives of the Center.

The cornerstone-laying is being held in connection with the fall meeting of the Board of Governors, on October 30 and 31, and the annual meeting of the American Bar Association Section Chairmen on November 1. Construction of the Center began July 15, and the work is being pushed with the project scheduled for completion in advance of the 1954 Annual Meeting of the Association to be held in Chicago next August 16 to 20.

At a meeting in Chicago to plan the cornerstone event, the Bar Foundation executive committee under the chairmanship of Allan H. W. Higgins, of Boston, directed that a cordial invitation be extended through the JOURNAL not only to all members of the American Bar Association, but also to all members of the Chicago and Illinois Bar Associations.

Because of weather uncertainties, the speaking portion of the program will be held indoors, in the auditorium of International House at the University of Chicago about four blocks from the Bar Center site. The program will begin at 10:15 A.M. Following the speaking program, the audience will proceed to the building site for the actual placing of the cornerstone. Mr. Higgins will preside over that phase of the program.

In the event of inclement weather, special buses will be available to transport those in attendance from International House, at 5859 South Dorchester Avenue, to the Bar Center location in the 1100 block, East 60th Street, opposite Rockefeller Chapel on the University of Chicago Midway.

Mr. Justice Jackson is Chairman of the Special Committee of the American Bar Association on the Administration of Criminal Justice. It is expected that in his cornerstone address he will discuss the importance of that research program to the national welfare, and the role of the organized Bar in its completion. The criminal justice study is to be the first major research undertaking of the Bar Center. The Ford Foundation recently made a planning grant of $50,000 to the Jackson committee to set it in motion.

A number of items of recognized historical interest will be placed in the cornerstone. They include a copy of the Diamond Jubilee issue of the JOURNAL; a copy of the *History of the American Bar Association;* names of the American Bar Foundation officers, campaign fund directors and builders, as well as current officers, Section and Committee personnel of the Association; the Constitution and By-Laws of the Association and the Charter of the Bar Foundation; the American Bar Association Commemorative Stamp and "first day" cover, and a copy of the deed for the building site.

Participants invited to take part in the cornerstone-laying phase of the program include George M. Morris, Washington, D. C., Chairman of the Foundation Finance Committee; David F. Maxwell, Philadelphia, Chairman of the House of Delegates; Tappan Gregory, Chicago, Editor-in-Chief of the JOURNAL; Joseph D. Stecher, Toledo, Ohio, Secretary, and Harold H. Bredell, Indianapolis, Indiana, Treasurer of the Foundation; Edson R. Sunderland, Ann Arbor, Michigan, author of the *History of the American Bar Association;* and the following Foundation officials: Donald A. Finkbeiner, Toledo, and Ross L. Malone, Jr., Roswell, New Mexico, of the Executive Committee; Roy E. Willy, Sioux Falls, South Dakota, and Harold L. Reeve, Chicago, of the Plans and Specifications Committee, and John Cobb Cooper, Princeton, New Jersey, Chairman of the Library and Research Committee.

Plans for the cornerstone ceremony were made by the Bar Foundation in consultation with a Chicago advisory committee of which Harold L. Reeve, Senior Vice President and Counsel of the Chicago Title and Trust Company, was chairman. Members of the advisory group included Richard Bentley, William H. Dillon, James P. Carey, Jr., and James P. Hume.

Through the cornerstone program, the Bar Foundation hopes to make the people of Chicago, and particularly the members of the Bar, the judiciary and the leaders in legal education, more familiar with the character of the Bar Center and its aims. The Center will be not only the national headquarters of the American Bar Association and affiliated legal organizations, but also the focal point of a continuing program of legal research. In it will be housed a national library where the publications and materials of the organized Bar will be preserved, correlated and made available for reference and study. The Center will be a "clearing house" for research activity in the field of law.

# Frank E. Holman

# Receives American Bar Association Medal

■ Frank E. Holman, of Seattle, Washington, was awarded the Association's highest honor, the American Bar Association Medal, at the Annual Dinner in Boston on August 27. Mr. Holman was President of the Association in 1948-1949 and has taken an influential part in many of its activities. He is well known for his vigorous leadership in the effort to obtain a constitutional amendment limiting the treaty-making power. As a Rhodes Scholar, he studied at Oxford University, England, and received the degree of B.A. in Jurisprudence in 1911, followed by a Master's degree in 1914. He was an instructor at the University of Utah Law School in 1912-13 and dean of that school from 1913 to 1915. Since that time he has engaged in active practice, but has devoted a great amount of time to patriotic causes and to strengthening the Bar's contributions in the public interest.

In presenting the Medal to Mr. Holman, David F. Maxwell, Chairman of the House of Delegates, said:

"American Bar Association—to uphold and defend the Constitution of the United States—so reads the first object and purpose of the American Bar Association.

"Upon the occasion of this, its 75th Anniversary, it is fitting that the Association should give recognition to one of its members who has made an outstanding contribution to the pursuit of that objective. In this time of unrest throughout the world, in this time of threatened triumph of doctrine inimical to those set forth in our Constitution, in this time when liberty-loving people everywhere are struggling desperately to reach a formula for peace, this member of our profession has stood steadfast for the principle that the preservation of our fundamental law must come first.

"Distinguished and patriotic Americans whose stature and influence would intimidate a less courageous man, have differed with him on the necessity for the protective measures he has advocated, but their opposition has not caused him to deviate from his firm conviction that a constitutional amendment is necessary to prevent treaties and other international agreements from attaining ascendancy over our domestic law.

"Without expectation of reward and without any compulsion other than the dictates of his own conscience, he has devoted his energies, his abilities, and his personal resources to the patriotic task of focusing public attention on one of the most important constitutional issues of our time.

"In recognition thereof, this Association proudly presents to its distinguished former President, Frank E. Holman, of Seattle, Washington, the American Bar Association's Medal for conspicuous and unselfish service to the cause of American jurisprudence."

In accepting the Medal, Mr. Holman said:

"The honor of receiving the American Bar Association Medal and your gracious words of presentation arouse feelings of humility and deep appreciation—but leaves me with a sense of inadequacy. I can think of many others in our great Association whose achievements at the Bar, whose contribution to learning and whose services to American jurisprudence exceed my own.

"Life is often a series of accidents. One is sometimes caught up in a course of events which he had little part in creating and which he did not even anticipate. As those events run their course he may find himself playing a role which he did not foresee. If such events concern some basic and public question and have an element of drama, he may even find himself projected into quite unexpected and undeserved prominence.

"When you honored me with the presidency of the American Bar Association in September, 1948, I had a very earnest talk with our great and beloved former president, William L. Ransom. We both felt that respect for constitutional government and appreciation of the principles and historical background of constitutional government had reached a low ebb; that an interest in and an understanding of the Constitution needed to be revived by alerting both the Bar and the public to some of the dangers threatening our constitutional rights and liberties. Some of you may remember that in accepting the presidency in Seattle in 1948, I made a statement which was later printed in bold type on the outer cover of the October, 1948, JOURNAL. That statement was as follows:

> We of this profession are sworn to uphold the Constitution and laws of our country, its form of government, and the institutions and liberties which have made our nation great and our people free. We are pledged to a federal republic, to the constitutional separation of the powers of government, to the rights and duties of states and localities, to resistance to encroachments by any one department of government upon any other, to the defense of individual rights against arbitrary powers and against bureaucratic centralizations which break down the impartial rule of law and substitute uncontrolled official discretions.

From that day to this, in one way or another—in research and by public addresses and writings—I have devoted most of my time and energy in attempting to develop in the minds and hearts of the American people a renewed loyalty to and interest in constitutional government and constitutional law. I receive letters from many people, more from laymen and persons in the humbler walks of life than from lawyers or men of learning. These letters show a real hunger for a better knowledge and understanding of the Constitution and indicate that in spite of the confusion of present-day thinking, thousands and thousands of Americans still rightly look upon the Constitution and its preservation as their only bulwark against loss of individual liberty and even the loss of the American form of government itself.

"The keynote of this Golden Jubilee meeting is 'Liberty Under Law'. Liberty without law is license and law without liberty is tyranny. For keeping the proper balance between the two—no better system of government has yet been conceived by man than the American form of a constitutional and representative republic. In so far as I may have contributed anything in effort or in learning to the defense of American constitutional government, I am thankful unto you and thankful unto God.

"While I shall treasure this Medal and the words of the citation that accompany it as a recognition of service to American jurisprudence in the field of constitutional law and constitutional government, I shall also no less treasure it as an expression of your abiding friendship and affection."

Thus Mr. Holman became the nineteenth lawyer to receive the American Bar Association Medal, a well-deserved reward for his ardent labor in the field of constitutional government.

# Fair Trial and Free Press:

# A Subject Vital to the Existence of Democracy

**by Edwin M. Otterbourg** · President of the New York County Lawyers Association

■ In an address before the National Conference of Bar Presidents, held last August in Boston under the auspices of the American Bar Association in connection with the Diamond Jubilee Meeting, Mr. Otterbourg pointed out that, while the subject of a fair trial and a free press is not a new one, it is one in which the Bar owes a great duty to our citizenship and about which, despite abortive attempts, nothing effective has been done. Mr. Otterbourg's remarks are published on these pages.

■ Freedom of the press has frequently been abused to become unlicensed pandering to a public desire for excitement, gossip and drama, to an extent where fair trials have become impossible in many instances. Lawyers, both for the prosecution and the defense, have used our free press in their own way to secure a "trial by newspaper" and for self-advertisement, all in complete disregard of professional propriety and ethics. As to district attorneys, Canon 5 specifically says that the primary duty of a lawyer engaged in public prosecution is not to convict but to see that justice is done. As to all lawyers, Canon 20 forbids newspaper publications by a lawyer as to pending or anticipated litigation which may interfere with a fair trial.

Is it a fair trial or is justice being done when we have "trial by newspaper"? A recent book gives a discussion of this subject and a valuable bibliography.[1]

Decisions by various courts have been handed down from time to time which have highlighted a conflict which has been developing between the guarantee of a fair trial and the guarantee of a free press. Verdicts have been set aside. Venues have been changed. Press and public have been barred in an attempt to assure fair trials.[2] A recent (1950) opinion of the Supreme Court of the United States, crystalized the issue as follows:[3]

> Freedom of the press, properly conceived, is basic to our constitutional system. Safeguards for the fair administration of criminal justice are enshrined in our Bill of Rights. . . .
>
> One of the demands of a democratic society is that the public should know what goes on in courts by being told by the press what happens there, to the end that the public may judge whether our system of criminal justice is fair and right.
>
> On the other hand our society has set apart court and jury as the tribunal for determining guilt or innocence on the basis of evidence adduced in court, so far as it is humanly possible.

As long ago as 1923, the American Society of Newspaper Editors adopted certain Canons of Journalism. The hope was there expressed that deliberate pandering to vicious instincts will encounter effective public disapproval or yield to the influence of preponderant professional condemnation. In those Canons, the editors said that the right of a newspaper to attract and hold readers is restricted by nothing but consideration of public welfare, and that a journalist who uses his power for any selfish or otherwise unworthy purpose is faithless to a high trust. Unfortunately, nothing further was done about these Canons officially.

Then, in 1936, an important Committee of the American Bar Association, headed by former Secretary of War Newton D. Baker, one of the country's foremost lawyers, together with representatives of the American Society of Newspaper Editors and of the American Newspaper Publishers Association, studied the whole subject. You will find a bril-

1. *Conduct of Judges and Lawyers*, by Judge Orie L. Phillips and Judge Philbrick McCoy, Chapter VIII, page 187.

2. *People* v. *Delaney* (Collector) C. C. A. First Cir. 1952; see: *New York Times*, February 15, 1952, where mistrial was granted because defendant's criminal background appeared in newspapers; see, Comments by court in *Shepherd* v. *Florida*, 341 U.S. 50.

Note: *Jelke* vice trial where both public and press were barred, N. Y. Gen. Sess. February, 1953.

Also: *People* v. *Florio*, granting change of venue because of unfair and undue publicity (1953).

Also: *Gilmore* divorce case, California Supreme Court (April, 1953) where public was barred but press permitted to stay "because they know their obligation to the public at large."

See: *Tanksley* v. *United States*, 145 F. 2d, 58; *Dutton* v. *State*, 123 Md. 373, 387.

3. *Maryland* v. *Baltimore Radio Show, Inc.* 338 U.S. 912; 70 S. Ct. 252.

liant and thorough analysis in the 1937 report of that Committee.[4] This Committee agreed upon many matters, and made many important recommendations. The House of Delegates officially approved the report and continued the Committee.[5]

The next year, 1938 (Chairman Baker having died), the Committee reported that the newspaper editors Delegates officially approved the report and that both of their Associations were willing to co-operate with the Bar, as to many recommendations. In that year's report to our House of Delegates, our Committee put it this way:[6]

> The true and proper interests of the press and the bar are in accord for they both serve the public and their existence is justified only by the service which they render. What would appear to be the selfish interests of either cannot be permitted to interfere with the interest of the public.

But there the matter seems to have rested all these years. The organized Bar has done nothing to enforce Canon 20. The news and media of publicity have gone on without any realistic attempt to police themselves. So far as the collection of news and its reporting in connection with court trials are concerned, the law of the jungle still applies. President Theodore Roosevelt's appeal for ethics and morality in American professional life which resulted in the adoption of our Code of Ethics and codes by other professions was unheeded by the "Fourth Estate".

Now, we lawyers are largely responsible for a free press in the United States. The clarion enunciation of liberty under law in the Declaration of Independence and the sacred guarantees of fair trial and free press in our Constitution and Bill of Rights are the work of lawyers. The establishment of a free press, resulting from the trial of John Peter Zenger, was the result of the patriotic work of a great lawyer.

It is the manifest duty of the present-day legal generation, in the same spirit of public service, to seek an answer to the following important present-day questions:

(1.) Cannot lawyers and journalists now develop a co-operative program together which will obviate the growing necessity for a solution by legislative fiat or by judicial decrees?

(2.) Must we wait until an aroused public opinion, spearheaded by men of all faiths, by parents' and teachers' associations, by chambers of commerce and civic groups, concerned with preserving morality, demand peremptory legislation restraining a free press?

(3.) Should our courts take it upon themselves, as long ago the English courts did, to exercise a firm judicial control on a free press so that public trials are no longer a matter of right but solely in the sound discretion of the court?

(4.) Cannot the "Fourth Estate", within its own ranks, adequately implement and amplify its Canons of Journalism to help solve the conflict?

The New York County Lawyers Association, through its Board of Directors, decided that the time has come to try to do something about this. If we can make any headway in the great City of New York, our example may be followed elsewhere. We believe our great metropolitan news services set the pattern and that we will have their co-operation and the co-operation of all worthwhile media of publicity, of radio, television and of screen. In any case, we shall make every effort to obtain this co-operation.

But first, we must show that we lawyers mean business now, that we propose to do something more effective than merely presenting reports, and that we are going to help clean up our own house as an immediate step.

Accordingly, joint meetings were held by our Committees on Professional Ethics and on Discipline. Out of these meetings, came reports recommending that Canon 20 be enforced and a suggestion that appropriate court rules be made by both the state supreme court and the United States district court in our district. As President of the Association, I shall communicate this action to the respective courts and hopefully look forward this coming fall to some action by them.

In addition, a Special Committee on Fair Trial and Free Press, composed of six distinguished members of our Association, has presented a proposed Code to govern the conduct *both* of lawyers and the media of publicity.[7]

This Code will come before our Board of Directors this fall for its consideration and I hope it will receive its approval.

At an all-day forum in the rooms of our Association, at which this entire problem was discussed by leading representatives of the press, radio, television, screen and publicity, as well as members of the Bar, it was apparent, from what was said, both on and off the record, that if the Bar did its part in enforcing Canon 20, we should receive full co-operation so far as it was possible. A complete report of the discussion at this forum is contained in our May, 1953, *Bar Bulletin* and will be supplied on request.

When the Special Committee of the American Bar Association reported in 1937, while mentioning the danger that any hard and fast rule might not be elastic enough to meet extraordinary circumstances, it nevertheless unanimously reported as follows:

> The Committee is, however, agreed that whatever limits are set in these matters ought at least be such as to prevent any bias or prejudice in the court either for or against the accused.

I have attached to these remarks some other striking excerpts from the report,[8] all proving that there should be no honest disagreement between us and the "Fourth Estate" about most matters.

4. 62 A. B. A. Rep., page 851.
5. 62 A. B. A. Rep., page 243.
6. 63 A. B. A. Rep., page 384.
7. Special Committee of New York County Lawyers Association consists of William Dean Embree, Chairman, Paxton Blair, Vice Chairman, Porter R. Chandler, W. Randolph Montgomery, William J. O'Shea, Simon H. Rifkind.
8. 62 A. B. A. Rep., page 865.

With the aid of the organized Bar, and good faith and good will on both sides, we can get most of the things done that should be done, and we certainly can better understand those things about which there may still be some disagreement.

Personally, I believe that no job is of greater importance to the organized Bar in the whole country than to understand this problem and to get at it now. The difference between ours and any form of totalitarian government is that we have the free right to say what we think, to print what we think and fearlessly to express our opinions. A vital difference is that we have also guaranteed in our basic law to every man,—be he rich or poor, proud or humble, yea, even to every newspaper editor and publisher—that he shall be assured a fair trial.

If these two great liberties,—the right to a fair trial and the right to a free press, are permitted to continue to conflict, obviously, the way soon will be opened for unfair trials on the one hand, and for unbridled license on the other. When once this becomes inevitably apparent, an aroused public may turn to some man on horseback who, to seize power, promises to enforce these rights. Whenever and wherever this has happened, both rights have soon completely disappeared and tyranny triumphed.

This situation we of the Bar must at all hazards seek to prevent. So must all leaders of agencies of news media, whose recent experience with censorship in more than one-half of the world should make them today most sensitive, and alert.

The steps which the New York County Lawyers Association has already taken and is going to take, I hope, are the beginnings of a program which will lead the Bar and the "Fourth Estate" along the path of a complete understanding. We can, thus, together, save for our country and ourselves our invaluable rights to a free press and a fair trial. Bar presidents and bar officials from all over the United States can spark-plug this action throughout our country. It is a subject vital to the future existence of our democracy,

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of profound interest to the public, the Bar and those concerned with news and publicity distribution.

## *Proposed Code on Fair Trial and Free Press*

WHEREAS, in the constitutional history of the American people the two concepts of a fair trial and a free press have been traditionally associated, and should always co-exist, without the necessity of either concept expanding at the expense of the others; and

WHEREAS, in recent years the cause of justice has suffered by reason of newspaper and other publicity during or immediately preceding trials, as well as subsequently thereto during the pendency of appeals, so that the efforts of the Courts to secure for the accused his rights to a fair trial have been thwarted and defeated; and

WHEREAS, informed opinion of persons in positions of leadership in these two related branches of human activity indicates the necessity of a restatement and clarification of principles the better to secure justice under law as their common objective;

NOW, THEREFORE, be it resolved that the Press on the one hand, and the Bench and the Bar on the other hand, do propose for acceptance the following principles:

1. The public is entitled to a complete and truthful factual statement of events occurring in the courtroom; but factual statements should not be elaborated with statements of opinion as to the way a case should be decided, or with statements designed to persuade either jury or judge to decide the case or frame a judgment in a particular way.

2. In certain cases the press should refrain from giving factual statements where to do so would impair public morals, or have a corrupting effect upon young readers.

3. Attorneys should not give interviews to the press in advance of, or during a trial stating either what they expect to prove or whom they propose to call as witnesses; and attorneys for both the prosecution and the defense should not, during the progress of the trial, engage in public criticism of either judge or jury, but should be scrupulous in conforming to Canon 20 of the Canons of Professional Ethics of the American Bar Association.

4. The press should not seek to ascertain and publish in advance the stories which witnesses expect to tell upon the witness stand; nor should they solicit from witnesses or parties and publish, articles by them giving what they purport to know about a case, or what they expect to prove or disprove; and this restraint should continue until the final disposition of the case, including appeals if any.

5. The press should not express opinions on the credibility of witnesses, nor advocate that particular witnesses be believed or disbelieved, nor advocate particular rulings on questions as to the admissibility of evidence.

6. Sensational headlines, not strictly warranted by the facts, should be avoided.

7. Where evidence has been excluded by the judge, or where objections have been sustained to a particular question

put to a witness, or where an answer has been stricken out, the press should not make public that which has thus been excluded from the jury by the judge.

8. Facts concerning the discreditable acts of a person prior to the commission of the crime for which he is being put on trial should not be published until the trial is over; provided, however, that judgments of convictions which have actually been entered and not reversed on appeal or vacated may be referred to. Nevertheless, allusions to prior convictions are to be discouraged because of their tendency to prejudice a jury.

9. Statements that a prisoner has confessed to a crime should not be made until proof of a confession has been received in evidence at the trial; and neither the police nor the district attorney or other law enforcing officer should give out in advance, statements concerning confessions.

10. After a verdict has been rendered, or the jury has disagreed, the press should not seek to ascertain, or publish, the attitude of particular jurors or the factors which influenced their decision.

11. In criminal cases the press should not, either editorially or otherwise, attempt to influence the judge as to what sentence he should impose.

12. These principles should be scrupulously observed to the end that the verdicts of juries and the judgments of courts shall not be influenced by anything except the evidence actually received at the trial.

**EXTRACTS** from a report of the Special Committee of the American Bar Association, the American Society of Newspaper Editors and the American Newspaper Publishers Association, delivered in 1937:

■ The personnel of the Special Committee consisted of six representatives of the American Bar Association, seven of the American Newspaper Publishers Association and five of the American Society of Newspaper Editors. Each group had its own Chairman, as follows:—for the AMERICAN BAR ASSOCIATION—NEWTON D. BAKER; for the AMERICAN NEWSPAPER PUBLISHERS—PAUL BELLAMY, Publisher of the *Cleveland Plain Dealer;* for the AMERICAN SOCIETY OF NEWSPAPER EDITORS—STUART H. PERRY, Editor of the *Michigan Telegram.*

It was agreed that the Hon. Newton D. Baker should be Chairman of the group, he having been Secretary of War under President Wilson and one of the recognized great of the legal thought in America. The Special Committee made its report to the American Bar Association at its Annual Meeting in 1937 and it is set out in full in the Year Book of the Association for that year. (62 A.B.A.Rep. 851)

That report was signed by each of the Chairmen who represented each of the groups above referred to. The following are some of the things that the Committee said in its report:

> The Committee is unanimous in believing that the highest interests of society require a system of judicial administration which, without fear or favor, will protect the rights both of society and of persons accused of breaching its peace. We are likewise unanimous in believing that all extraneous influences which tend, or may tend, to create favor, prejudice, or passion should be eliminated.
>
> The complexity of our problem arises from attempts to answer the question, "What are such prejudicial extraneous influences and by what methods shall they be controlled?"

Recognizing that there was a great difference of opinion about some of the subjects, because there were radically different points of view in approaching the problem, the comment was made —

> These differences had primarily to do with the best method of attaining the common object rather than as to what the common object was.

As to the Bar, the Report says:

> The Bar has always been regarded as the nursery of political careers. Lawyers have, therefore, yielded to the temptation to seek publicity for their professional efforts as a basis for careers which they hope to achieve either on the Bench or in executive or legislative office. This takes place in a country in which advertising has enormously increased in volume and attained a competitive vividness which makes the vendors of all services or wares compete for attention by spectacular and clamorous appeals.

The report says that there is enough of the tradition and ethics of the Bar left to prevent any direct advertising, but that the "indirect form of advertising one's professional skill, by seeking publicity for activity in conspicuous cases, is still open, and undoubtedly much of the publicity attending sensational cases, which has seemed unfortunate, has been directly due to efforts by public prosecutors and defendants' counsel to center the spotlight of public attention upon themselves".

As to the newspapers and other agents of publicity, the Report has this to say. It states that these have three functions: (1) "the dissemination of news", (2) "the editorial guidance of public opinion", and (3) "the conduct of a commercial business".

> In the purveying of news, accuracy and relative importance are the only standards. In the guidance of public opinions, newspapers may, of course, at times be affected by political partisanship, but more often they are conscious of an obligation to protect the public against the maladministration of justice due to political or other improper interferences, with the consequence that judges and judicial proceedings are regarded as within the general field of official conduct, the purity of which can be preserved only by fearless and outspoken criticism.
>
> As a commercial business, the newspaper is interested in selling papers. The profit of the business depends upon its returns from advertising, which in turn rise or fall with the increase or decrease of a paper's circulation. More papers are sold when a people are excited about an exciting subject. The temptation to make subjects exciting beyond their intrinsic importance is, therefore, great.

The Committee points out that "The preservation of the balance among these three functions is, of course, best attained by newspapers published and edited by men who are themselves conscious of the social and political importance of their calling", it being basic, however, that "The freedom of the press is not only guaranteed by our laws but is protected by a wise public opinion

*(Continued on page 1021)*

# Scott M. Loftin, 1878-1953

## Fifty-Eighth President of the Association

■ Scott M. Loftin, of Jacksonville, Florida, the fifty-eighth President of the American Bar Association (1934-1935), died on September 22 at Highlands, North Carolina, where he was spending a vacation.

Mr. Loftin was a man of wide interests, both civic and professional. He was born in Montgomery, Alabama, on September 14, 1878. When he was 9 years old, his family moved to Pensacola, Florida. His father, William M. Loftin, founded the *Pensacola Journal* in 1887 and was its editor and publisher until his death in 1899. Scott Loftin attended the public schools of Pensacola and received his legal education at Washington and Lee University, where he also received an honorary Doctor of Laws degree in 1934. He was admitted to the Bar at the age of 20, following which he practiced in Pensacola. In 1902 he was elected to the Florida House of Representatives and was the youngest member of that body in the 1903 session. He was appointed county prosecuting attorney in 1904 and filled that office, by successive re-election, for thirteen years.

In 1917 Mr. Loftin formed a connection with the interests of the late Henry M. Flagler, which brought about his change of residence to Jacksonville. On the death of William A. Blount, who was President of the American Bar Association in 1920-1921, Mr. Loftin succeeded him as general counsel of the Flagler Interests, the largest combination of interests under a single head in Florida.

Despite his busy professional life, Mr. Loftin found time to take an active part in civic affairs. He served as a director of the Florida Chamber of Commerce, past Governor of the Florida District, Kiwanis International, and was a member of numerous fraternal and civic organizations.

In May of 1936, Mr. Loftin was appointed by the late Governor Sholtz of Florida to fill the unexpired term of Senator Park Trammel, who died in office. Mr. Loftin did not run for election upon the expiration of this term six months later.

Mr. Loftin took an active part in the work of the American Bar Association for many years. Prior to his election as President, he had served a three-year term on the Executive Committee and had for many years represented Florida on the General Council of the Association. He also served as a Vice President of the Association and on nu-

merous important committees. He was one of the Florida delegates to the National Conference of Commissioners on Uniform State Laws.

In his message in the Diamond Jubilee Issue of the JOURNAL, Mr. Loftin spoke of his pride in looking forward to the Boston meeting this year. It was at Boston in 1936 that he relinquished the reins as President of the Association and closed his term. At that meeting the Constitution and By-Laws of the Association were revised and the House of Delegates was created, and in general the Association was made into a much more representative body than it had been. Scott Loftin had always been a great believer in the value of the work of the younger members of the Bar and he was particularly interested in the Junior Bar Conference. He remarked on the fact that its first meeting was held at the time of his election as President of the Association and as he says "I have watched with keen interest its remarkable progress in the intervening years." He also said "I regard the Junior Bar Conference as one of the most valuable of these Sections, for while its membership is limited to those under 36 years of age, it is remarkable how much has been accomplished for the good of the Association by the vigorous young lawyers enrolled in the Junior Bar."

He is survived by two sisters, Miss Josephine Loftin and Mrs. C. H. Cushman.

# Opinion of Professional Ethics Committee

**OPINION 287**
**(June 27, 1953)**

**CONFIDENTIAL COMMUNICATIONS—CANDOR AND FAIRNESS TO THE COURT—Duty of lawyer on learning of client's perjury in litigation conducted by him. Conflicting loyalties under Canons 6 and 37, and under Canons 15, 22, 29, 32 and 41.**

**Canons 6, 15, 22, 29, 32, 37, 41.**

**Opinions 23, 91, 155, 156, 250, 268, 280**

■ Inquiries to this Committee by the ethics committees of a state and of a local bar association involve analogous questions as to the duty of a lawyer under Canons 6 and 37, and under Canons 15, 22, 29, 32 and 41, to disclose to the court or the prosecuting authorities the commission by the lawyer's client of perjury in litigation conducted by the lawyer.

I.

The first, from the state committee, states the following facts and makes the following inquiries:

FACTS

An attorney represents a client in a suit for divorce and a decree for divorce from bonds of matrimony is duly entered by the court on November 6, 1952, in favor of the client on the grounds of willful desertion and abandonment by his wife as of March 15, 1950. The wife was represented by counsel in the divorce action and she was fully apprised of the evidence presented on behalf of her husband. Three months after entry of the decree, the client again comes to the attorney seeking advice by reason of the following situation: The client tells the attorney that he, the client, gave false testimony at the taking of the depositions upon which his decree for divorce was based; that the date of desertion was not March 15, 1950, as he had testified, but was actually the early part of November 1951, (which, under the local law, would have made the action premature); that his former wife threatens to disclose the true facts to the court unless support money is forthcoming. The client has not remarried, nor has his former wife.

INQUIRIES

What is the duty of the attorney to the court, as an officer of the court, after learning that the testimony of his client in the suit for divorce was false?

What is the duty of the attorney to his client, who, when seeking advice, disclosed the fact that he had testified falsely in the suit for divorce?

II.

The second, from the ethics committee of a local bar association, is as follows:

(1) A convicted client stands before the judge for the sentence. The custodian of criminal records indicates to the court that the defendant has no record. The court thereupon says to the defendant, "You have no criminal record, so I will put you on probation."

Defense counsel knows by independent investigation or from his client that his client in fact has a criminal record and that the record clerk's information is incorrect. Is it the duty of defense counsel to disclose to the court the true facts as to his client's criminal record?

(2) Suppose, under the above cir-

cumstances, that the judge before disposing of the case asks the defendant himself whether he has a criminal record and the defendant answers that he has none. Is it the duty of defense counsel to disclose to the court the true facts as to his client's criminal record?

(3) Assume further a situation in which the judge following the conviction asks the defendant's lawyer whether his client has a criminal record.

■ The Opinion of the Committee is stated by MR. DRINKER, Messrs. Jackson, Frederic M. Miller and Shackelford Miller concurring; Mr. Jones, files an opinion concurring in part and dissenting in part; Messrs. Brucker and White dissent and file a joint dissenting opinion.

■ Canon 37 provides that it is the duty of a lawyer to preserve his client's confidences, which duty outlasts the lawyer's employment. This Canon, as amended in 1937, elaborated the provision of the original (1908) Canon 6, which stated the lawyer's "obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences. . . "

The privilege of nondisclosure of the client's communications to his lawyer, embodied in Canon 37, has long been a part of the common law. It is thus defined by Wigmore (Vol. VIII, 3d Ed., Section 2292):

> Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by his legal adviser, except the protection be waived.

In the early days, during the sixteenth century, when the rule first appeared, it was apparently based on a consideration for the oath and honor of the lawyer, rather than for the apprehensions of the client (Wigmore, Section 2290), but later, and in more modern times it was based on the principle that "in order to promote freedom of consultation of legal advisers by clients, the apprehension of compelled disclosure by the legal advisers must be removed". (*Id.* Section 2291, and opinions quoted).

In our Opinion 150, quoting *Thornton on Attorneys*, §94, we said that this rule

> has been steadily upheld by the courts on the ground, that for the proper administration of the law, the confidence which it encourages the client to repose in the attorney to whom he resorts for legal advice and assistance, should upon all occasions be inviolable, because greater mischiefs would probably result from requiring or permitting its disclosure than from wholly rejecting evidence thereof. *The rule is not one of mere professional conduct.* [Italics supplied]

The basis of the rule was thus stated by Lord Chancellor Brougham in *Greenough* v. *Gaskell*, 1 Myl. & K. 98, 103 (1833):

> The foundation of this rule is not difficult to discover. It is not (as has sometimes been said) on account of any particular importance which the law attributes to the business of legal professors, or any particular disposition to afford them protection (though certainly it may not be very easy to discover why a like privilege has been refused to others, and especially to medical advisers.) But it is out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on without the aid of men skilled in jurisprudence, in the practice of the courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, every one would be thrown upon his own legal resources. Deprived of all professional assistance, a man would not venture to consult any skillful person, or would only dare to tell his counsellor half his case.

The reason and the purpose of the rule embodied in Canon 37 were thus summarized in two of this Committee's opinions. In Opinion 91 we said:

> The reason for the rule lies in the fact that it is esssential to the administration of justice that there should be perfect freedom of consultation by client with attorney without any apprehension of a compelled disclosure by the attorney to the detriment of the client.

In Opinion 250 we quoted the following passage from *Mechem on Agency:*

> The purposes and necessities of the relation between a client and his attorney require, in many cases, on the part of the client, the fullest and freest disclosures to the attorney of the client's objects, motives and acts. This disclosure is made in the strictest confidence, relying upon the attorney's honor and fidelity. To permit the attorney to reveal to others what is so disclosed, would be not only a gross violation of a sacred trust upon his part, but it would utterly destroy and prevent the usefulness and benefits to be derived from professional assistance.

Canon 37 recognizes and specifies conditions under which the privilege is not applicable, the second paragraph providing that the announced intention of a client to commit a crime is not included within the confidences which he is bound to respect, and states that he may properly make such disclosure as may be necessary to prevent the criminal act or to protect those against whom it is threatened.

The case put is clearly not one coming within the exception. The crime of perjury has already been committed; the question is not one of preventing the commission of the crime, and the wife, being at least a tacit party to the fraud on the court, requires no protection. Any inconsistency in this connection between our decisions in Opinions 155 and 156 and that in Opinion 23 we would resolve in favor of Opinion 23.

In the case submitted to us, the communication by the client to the lawyer that he had committed perjury was made to the lawyer in his professional capacity, when seeking advice as to what to do, and is within the letter and the spirit of Canon 37, which would apply unless controlled by some other Canon or consideration.

Canon 41 provides as follows:

> When a lawyer discovers that some fraud or deception has been practiced, which has unjustly imposed upon the court or a party, he should endeavor to rectify it; at first by advising his client, and if his client refuses to forego the advantage thus unjustly gained,

> he should promptly inform the injured person or his counsel, so that they may take appropriate steps.

We do not believe that Canon 41 was directed at a case such as that here presented but rather at one in which, in a civil suit, the lawyer's client has secured an improper advantage over the other through fraud or deception.

Nor do we not think that because the state is considered an interested party to proceedings to sever the matrimonial relation of its citizens the state or the court may therefore be treated as an "injured person" within the meaning of Canon 41.

A more forcible argument for an exception to Canon 37 is found in Canon 29, which provides:

> The counsel upon the trial of a cause in which perjury has been committed owe it to the profession and to the public to bring the matter to the knowledge of the prosecuting authorities.

On its face this provision would apparently make it the duty of the lawyer to disclose his client's prior perjury to the prosecuting authorities. However, to do so in this case would involve the direct violation of Canon 37.

Accordingly, it is essential to determine which of the Canons controls.

Neither Canon 41 nor Canon 29 specifically requires the lawyer to advise the *court* of his client's perjury, even where this was committed in a case in which the lawyer was acting as counsel and an officer of the court. We do not consider that either the duty of candor and fairness to the court, as stated in Canon 22, or the provisions of Canons 29 and 41 above quoted are sufficient to override the purpose, policy and express obligation under Canon 37.

In the case stated the lawyer should urge his client to make the disclosure, advising him that this is essential to secure for him any leniency in the event of the court's finding out the truth. He should also advise him to tell his wife that he proposes to do so, and thus avoid further blackmail. If the client will not take this advice, the lawyer should have nothing further to do with him, but despite Canons 29 and 41, should not disclose the facts to the court or to the authorities. Compare also Opinion 268.

Turning to the second inquiry, relative to the convicted client up for sentence, whose lawyer sees the court put him on probation by reason of the court's misinformation as to his criminal record, known to the lawyer: If the client's criminal record was communicated by him to his counsel when seeking professional advice from him, Canon 37 would prevent its disclosure to the court unless the provisions of Canons 22, 29 and 41 require this. If the court asks the defendant whether he has a criminal record and he answers that he has none, this, although perhaps not technical perjury, for the purposes of the present question amounts to the same thing. Despite this, we do not believe the lawyer justified in violating his obligation under Canon 37. He should, in due course, endeavor to persuade the client to tell the court the truth and if he refuses to do so should sever his relations with the client, but should not violate the client's confidence. We yield to none in our insistence on the lawyer's loyalty to the court of which he is an officer. Such loyalty does not, however, consist merely in respect for the judicial office and candor and frankness to the judge. It involves also the steadfast maintenance of the principles which the courts themselves have evolved for the effective administration of justice, one of the most firmly established of which is the preservation undisclosed of the confidences communicated by his clients to the lawyer in his professional capacity.

If the fact of the client's criminal record was learned by the lawyer without communication, confidential or otherwise, from his client, or on his behalf, Canon 37 would not be applicable, and the only problem would be as to the conflicting loyalties of the lawyer on the one hand to represent his client with undivided fidelity and not to divulge his secrets (Canon 6), and on the other to treat the court in every case in which he appears as counsel, with the candor and fairness (Canon 22) which the court has the right to expect of him as its officer. In this case we deem the following considerations applicable.

If the court asks the lawyer whether the clerk's statement is correct, the lawyer is not bound by fidelity to the client to tell the court what he knows to be an untruth, and should ask the court to excuse him from answering the question, and retire from the case, though this would doubtless put the court on further inquiry as to the truth.

Even, however, if the court does not directly ask the lawyer this question, such an inquiry may well be implied from the circumstances, including the lawyer's previous relations with the court. The situation is analogous to that discussed in our Opinion 280 where counsel knows of an essential decision not cited by his opponent and where his silence might reasonably be regarded by the court as an implied representation by him that he knew of no such authority. If, under all the circumstances, the lawyer believes that the court relies on him as corroborating the correctness of the statement by the clerk or by the client that the client has no criminal record, the lawyer's duty of candor and fairness to the court requires him, in our opinion, to advise the court not to rely on counsel's personal knowledge as to the facts of the client's record. While doubtless a client who would permit the court, because of misinformation, to be unduly lenient to him would be indignant when his lawyer volunteered to ruin his chance of escaping a jail sentence, such indignation would be unjustified since the client's bad faith had made the lawyer's action necessary. The indignation of the court, however, on learning that the lawyer had deliberately permitted him, where no privileged communication is involved, to rely on what the lawyer knew to be a misapprehension of the true facts, would be something that the lawyer could not appease on the basis of

loyalty to the client. No client may demand or expect of his lawyer, in the furtherance of his cause, disloyalty to the law whose minister he is (Canon 32), or "any manner of fraud or chicane". (Canon 15).

If the lawyer is quite clear that the court does not rely on him as corroborating, by his silence, the statement of the clerk or of his client, the lawyer is not, in our opinion, bound to speak out.

Opinion concurring in part and dissenting in part by William B. Jones.

I concur with the majority opinion except in the following two (2) particulars:

1. In discussing the second inquiry, relative to the convicted client being placed on probation by the court because of the misinformation received by the judge as to the client's criminal record, the majority opinion makes a distinction between information received by the lawyer in a direct communication from the client and information received by the lawyer through other sources while he is engaged in his professional work of representing the client. I do not believe there is any basis for such a distinction. I think that Canon 37 applies to all information received by the lawyer, whether or not directly from the client, when the information is received in the course of the lawyer's professional employment and as a result of the confidential relationship existing because of that employment. On other occasions, this committee, I believe, has so construed Canon 37.

In Opinion 163, this committee has stated that Canon 37 places every lawyer under a duty "not to divulge to others what he learns about his client's business by reason of their confidential relationship".

In Opinion 202, we have stated that a lawyer "may not divulge confidential communications, information, and secrets imparted to him by the client *or acquired during their professional relations,* unless he is authorized to do so by the client." (Italics supplied.)

Assuming that in the case discussed in the majority opinion the lawyer learned of his client's prior criminal record, not by any direct communication from the client, but as a result of his professional work for the client, I am of the view that such information is a confidence or secret of the client that the lawyer is bound to preserve. Canons 37, 6.

2. The majority opinion deals differently with the obligation of a lawyer to the client and to the court when the client's criminal record was communicated by the client to his counsel at the time the latter's professional advice was sought, and when the client's criminal record was learned by the lawyer without such communication by the client.

As I have noted above, in my view Canons 37 and 6 impose the same obligation on the lawyer whether he receives his information directly from the client or whether he acquires it in the course of the professional work he is doing on behalf of the client. Therefore, I would not distinguish as to the matter of obligation based on the method of acquiring the client's secrets and confidences.

Dissenting opinion concurred in by Wilber M. Brucker and William H. White

We can not subscribe to the majority opinion. Canon 29 expressly provides:

> The counsel upon the trial of the cause in which perjury has been committed owe it to the profession and to the public to bring the matter to the knowledge of the prosecuting authorities.

No good reason exists for ignoring the plain and unmistakable mandate of this Canon. Canon 29 is based upon sound public policy which singles out perjury because perjury strikes at the roots of our American system of jurisprudence. Perjured testimony poisons the well-springs and makes a mockery of justice. Canon 29 enjoins lawyers, as officers of the court, to protect the cause of justice and to assist public authorities in stamping out perjury, no matter by whom committed. The sweeping provisions of Canon 29 do not give a lawyer his choice to report only that perjury which is committed by the opposite party, but require him to report any *perjury*, including that committed by his own client or witnesses. No exception is made in Canon 29 as to the manner in which the knowledge of perjury is acquired by the lawyer. No longer is a trial supposed to be a "Game" to be played by unscrupulous laymen with lawyers as mere pawns. Canon 29 seeks to make a trial an organized search for the truth,—charging the lawyers with the duty of seeing that no litigant prevails through perjury.

In addition, Canon 41 deals another blow at perjury and emphasizes the duty of a lawyer to report perjury to the court, as follows:

> When a lawyer discovers that some fraud or deception has been practiced, which has unjustly imposed upon the court or a party, he should endeavor to rectify it; at first by advising his client, and if his client refuses to forego the advantage thus unjustly gained, he should promptly inform the injured person or his counsel so that they may take appropriate steps.

Particularly are these admonitions applicable to divorce cases where there are three interested parties,—the husband, the wife, and the state. The policy of the law of all states forbids divorce by mere consent, and in many states collusion between husband and wife is branded as a criminal act. The sanctity of the marital relationship is of supreme importance to the state. Upon it depends the home and family which are the fundamentals of society. In divorce proceedings, perjury is particularly easy to commit and is extremely difficult to detect.

As if Canon 29 and Canon 41 were not enough, Canon 15 provides: "The office of attorney does not permit, much less does it demand of him, for any client, violation of law or any manner of fraud or chicane. He must obey his own conscience and not that of his client." Also, Canon 22 requires the utmost "candor and fairness" on the part of the lawyer in all his dealings with the court. In view of all these positive admonitions, how can a lawyer ex-

pect to remain passive when willful and deliberate perjury, fraud and deception have been committed or are being committed in the course of a trial?

In the first set of facts before our Committee, the plaintiff-husband filed a sworn bill of complaint charging desertion one year and seven months before it occurred for the sole purpose of furnishing a fraudulent ground for divorce. This statement was willfully false. The defendant-wife must have known of its utter falsity, and hence collusively acquiesced. Upon the hearing, the plaintiff-husband gave perjured testimony upon the basis of which the court granted him a decree of absolute divorce. Under these circumstances, can there be any doubt about the duty of the lawyer to follow the clear mandate of Canon 29?

In the second set of facts, a convicted client stood before the court for sentence. At this critical juncture the court sought information as to whether the defendant had a criminal record. The clerk informed the court that the defendant had no criminal record. The lawyer knew that his client did have a criminal record. Under these circumstances, can a lawyer stand idly by in open court and permit the court to be deceived at a time when the lawyer knows that the court is relying upon an untrue statement? In Opinion 280 it was held that a lawyer could not remain silent when he knows of an essential decision not cited by his opponent, but is required to volunteer such citation, no matter whether it affects his client adversely. We think that Canons 29, 41, 15 and 22 require the lawyer to see that his client gives the court the truth about his criminal record or the lawyer must do so himself. Specifically, we think the answer should be in the affirmative to all three questions propounded in the second inquiry. The *method* by which the lawyer brings the true information to the knowledge of the court is a mere detail. Whether the lawyer asks for a recess to advise privately with his client about disclosing the truth, or whether the lawyer makes the suggestion to his client in open court, is merely a choice of procedure. In our opinion the lawyer's duty under these circumstances is to see that his client reveals the truth to the court about his criminal record, and if the client refuses, the lawyer's duty to do so becomes mandatory under Canons 29 and 41.

We think that the majority opinion does obeisance to Canon 37. We concede that Canon 37 is based upon public policy. However, Canons 29, 41, 15 and 22 are likewise based upon public policy. Canon 37 is not superior to Canons 29, 41, 15 and 22, but must be interpreted in light of the mandatory provisions expressed in these Canons. Canon 37 should not be stretched to require a lawyer to remain silent about perjury, fraud and deception when the clear mandate of Canons 29 and 41 require a lawyer to guard the court and the public against these vicious practices. Accordingly, for all these reasons we respectfully dissent from the majority opinion and believe the lawyer should be guided by Canons 29 and 41.

## *Institute on Law and the Entertainment Industry*

■ The School of Law of the University of California at Berkeley, California, has scheduled a symposium on current local problems in the field of motion pictures, radio, television and recording. Sessions will be held on November 12, 13 and 14, 1953.

Outstanding speakers will discuss such subjects as "The Invasion of the Right of Privacy by Electronic Device", "Unfair Competition in Ideas and Titles", "Negotiation and Enforcement of Personal Service Contracts", "Defamation", and other problems of artists, actors, producers, telecasters and recorders.

The list of speakers includes Rudolph Callmann and John Schulman of New York City, Professor Benjamin Kaplan of the Harvard University School of Law, Dean William L. Prosser of the University of California School of Law, William Carman, Herman Selvin, Joseph Dubin, Robert Myers, David Tannenbaum, and Gordon Youngman of Los Angeles, California.

The registration fee is $15.00 including the reception and dinner which will be held November 13. For further information or registration, write Adrian A. Kragen, School of Law, University of California, Berkeley 4, California.

# The New Chief Justice of the United States

■ Chief Justice Taft, whose legal activities prior to appointment were not dissimilar to Earl Warren's, is quoted by Charles Evans Hughes (Pusey's *Life of Hughes,* page 625) as having said that a constitutional lawyer is one who has abandoned the practice of law and gone into politics. That, indeed, was the record of many of the Chief Justices. Nearly every Chief Justice had a political as well as a legal career. The earlier appointments, including even those of John Marshall and Samuel Chase, were almost purely political, and there have been some since. A political appointment is not necessarily a bad appointment. Certainly, in the light of historical precedent, the nomination and fitness of Earl Warren can stand comparison without disparagement.

The notion, somewhat prevalent among laymen who ought to know better, that the functions of the Chief Justice are mostly administrative, so that he need not be as good a lawyer as the Associate Justices, is not accurate for he has other exacting responsibilities. He presides and is supposed to take the lead in conferences. That calls for force of character and a clear understanding of each case under discussion. Moreover, the cases that come before the Court usually have two arguable sides so that it is frequently divided on pretty fundamental issues. The Chief Justice has a vote which may well determine which side wins and he may be called on to write the Court's opinion.

Earl Warren was born in Los Angeles in 1891, so that he is well within any reasonable age limit. He is a graduate of the University of California, Class of 1912, and after completing the course in the law school received a J. D. degree. He practiced law for a short while in San Francisco and Oakland; took time out for Army service in World War I; was for a while clerk of the Assembly Judiciary Committee of the California legislature (a postgraduate law school in itself); a Deputy City Attorney of Oakland, where he dealt with civil cases; and then he became a Deputy District Attorney, and later District Attorney, for the large and populous County of Alameda, in which Oakland lies. He was in the District Attorney's office for about twenty years, during which he displayed an integrity, courage and ability that attracted nation-wide attention and the unwavering confidence of the voters of the county. He was then elected to the very important office of Attorney General of California, which he held for four years with great success and acclaim, until his election as Governor of California in 1943. He was re-elected in 1946, receiving both Republican and Democratic nominations in a state-wide public primary. He is the only California governor who has been elected for three terms, and he resigned the office only to become Chief Justice of the United States. In the meanwhile he had been nominated for the office of Vice President by the Republican Convention, but had gone down with Dewey in the debacle from which Truman emerged as President. As Governor, he reduced taxes, balanced the state's budget every year, and accumulated a surplus.

In these offices which Warren has held, he was in constant touch with legal questions, civil and criminal, of the very kind which come to the Supreme Court. That is the schooling Chief Justice Taft had in mind when he indicated a political career as the best training for a constitutional lawyer. Few laymen seem to realize, and even lawyers sometimes forget, that under the existing rules and practices, few of the ordinary run of civil cases between citizens ever reach the calendar of the Supreme Court. As District Attorney, as Attorney General and as Governor, Earl Warren, the lawyer, has been concerned with civil rights, the relations of government to the individual and of the nation to the states, and questions of taxation, the fields in which lie most of the Supreme Court's jurisdiction and activities. His clear concept of the importance of the judiciary in the American system is evidenced by the fact that he has never made a judicial appointment without first obtaining the approval of the Board of Governors of the State Bar of California, and no judge appointed by him has since been defeated for re-election.

Earl Warren's political and moral courage, his skill as an administrator, his ability to get along with colleagues, and his intellectual and moral integrity, have been demonstrated to the people of California through a long period in public offices that called for fortitude, probity and ability. He has a keen and well trained legal mind, he understands men and women as well as measures and he is not easily fooled. The nation will discover all this in due course, as California did.

EUSTACE CULLINAN
San Francisco, California

# Tax Notes

■ **Prepared by Committee on Publications, Section of Taxation, Harry K. Mansfield, Chairman.**

## Taxability of Short-Term Alimony Payments Subject to Termination on Wife's Remarriage

■ Under Section 22 (k) of the Internal Revenue Code, alimony is includible in the gross income of a divorced or legally separated wife, and under Section 23 (u) it is deductible from the husband's gross income. These statutory provisions have caused much litigation and are among those being considered in connection with revenue revision by the House Ways and Means Committee. The need for one such amendment is indicated by the recent case of *Baker* v. *Commissioner*, 205 F.2d 369 (2d Cir. 1953), *reversing* 17 T.C. 1610 (1952), which illustrates the difficulty of distinguishing between payments for support (alimony) and payments in settlement of marital property rights.

In general, only support payments are income to the divorced or legally separated wife and are deductible from the husband's gross income. Congress, however, did not use the words "support", "alimony" and "marital property rights" in describing the payments that are and are not taxable to the wife under Section 22 (k). The omission of these words was to avoid disputes and, as revealed in the legislative history, to "produce uniformity in the treatment of amounts paid in the nature of or in lieu of alimony regardless of variance in the laws of different States concerning the existence and continuance of an obligation to pay alimony".

Instead, Section 22 (k) makes taxable to the wife only "periodic payments" received after her decree of divorce or separate maintenance (1) when they discharge a legal obligation, imposed or incurred, "because of the marital or family relationship", in the decree of divorce or of separate maintenance or in a written instrument incident thereto; and (2) if the payments are in discharge of a principal sum of the obligation that is "in terms of money or property, specified in the decree or instrument", then only when such principal sum is payable over a period in excess of ten years. In other words, if the payments are to discharge in less than ten years a "principal sum . . . specified", they are not included in the wife's taxable income and are not deductible from the husband's gross income. On the other hand, if payments are to last in excess of ten years, it is immaterial whether or not they discharge a "principal sum . . . specified". However, Section 22 (k) provides that installment payments in discharge of a principal sum which last over ten years will be deductible only in a maximum amount that is ten per cent of the principal sum so specified.

In the *Baker* case, a husband agreed in a written separation agreement, later incorporated in a divorce decree, to pay his wife $200 per month for six years, but if she should remarry or die within this time, all payments were to cease. The question was raised whether these monthly payments were "periodic payments" or were "installment payments" in discharge of a "principal sum . . . specified", since they were to last under ten years.

In several decisions beginning with *J. B. Steinel*, 10 T. C. 409 (1948), the Tax Court has held that such

*(Continued on page 1020)*

# Harvard Graduates Honor Professor Samuel Williston

■ One of the features of the Diamond Jubilee Meeting was the tribute which members of the Association who had studied under Professor Samuel Williston at the Harvard Law School paid their beloved teacher. They gave him a bridge table, bearing a gilt-tooled inscription on its leather top, and packs of Harvard-emblazoned playing cards, in the quantity indicated by the obviously extraordinary expectancy of this hale and hardy nonagenarian—more than enough to last an ordinary lifetime.

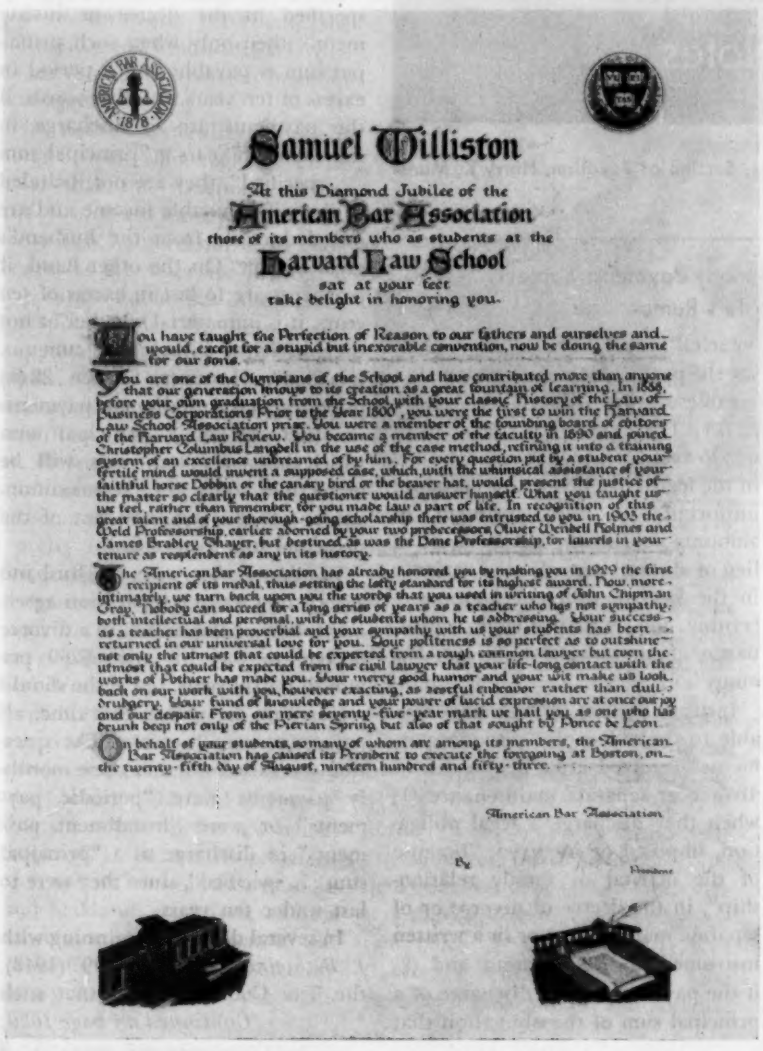
The presentation took place at Professor Williston's house in Cambridge on the afternoon of August 27. Present were his sister, Miss Emily Williston, and the congratulatory deputation consisting of Mrs. Olive G. Ricker, former Executive Secretary of the Association, Miss Helen Macmillan and Joseph N. Welch, Harvard Law School, 1917, of the Boston law office to which Professor Williston is counsel, and Judge Edward J. Dimock, Harvard Law School, 1914. Professor Williston, responded gracefully and evidenced obvious pleasure, quite as much, it must be admitted, at the ladies' visit as at the presents and felicitations.

By way of greeting card, the gifts were accompanied by an illuminated parchment bearing the following message:

Samuel Williston
At this Diamond Jubilee of the
American Bar Association
those of its members
who as students at the
Harvard Law School
sat at your feet
take delight in honoring you.

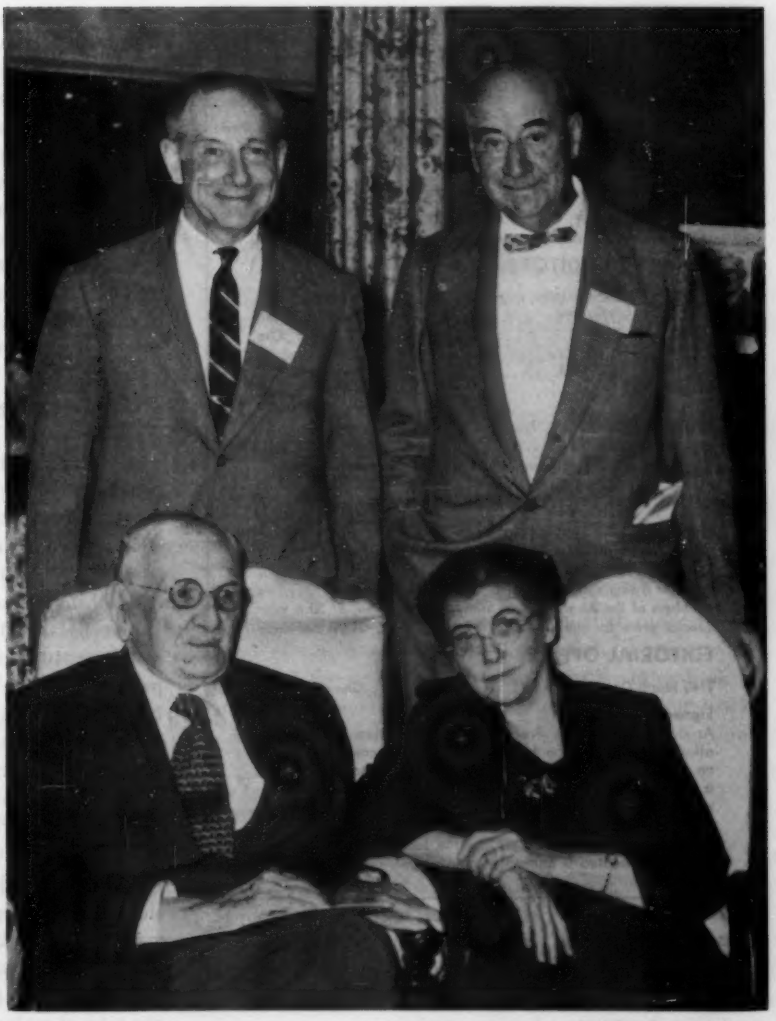
You have taught the Perfection of Reason to our fathers and ourselves and would, except for a stupid but inexorable convention, now be doing the same for our sons.

You are one of the Olympians of the School and have contributed more than anyone that our generation knows to its creation as a great fountain of learning. In 1888, before your own graduation from the School, with your classic "History of the Law of Business Corporations Prior to the Year 1800", you were the first to win the Harvard Law School Association prize. You were a member of the founding board of editors of the Harvard Law Review. You became a member of the faculty in 1890 and joined Christopher Columbus Langdell in the use of the case method, refining it into a training system of an excellence undreamed of by him. For every question put by a student your fertile mind would invent a supposed case, which with the whimsical assistance of your faithful horse Dobbin or the canary bird or the beaver hat, would present the justice of the matter so clearly that the questioner would answer himself. What you taught us we feel, rather than remember, for you made law a part of life. In recognition of this great talent and of your thorough-going scholarship there



was entrusted to you in 1903 the Weld Professorship, earlier adorned by your two predecessors, Oliver Wendell Holmes and James Bradley Thayer, but destined, as was the Dane Professorship, for laurels in your tenure as resplendent as any in its history.

The American Bar Association has already honored you by making you in 1929 the first recipient of its medal, thus setting the lofty standard for its highest award. Now, more intimately, we turn back upon you the words that you used in writing of John Chipman Gray, "Nobody can succeed for a long series of years as a teacher who has not sympathy, both intellectual and personal, with the students whom he is addressing." Your success as a teacher has been proverbial and your sympathy with us your students has been returned in our universal love for you. Your politeness is so perfect as to outshine not only the utmost that could be expected from a rough common lawyer but even the utmost that could be expected from the civil lawyer that your life-long contact with the works of Pothier has made you. Your merry good humor and your wit make us look back on our work with you, however exacting, as zestful endeavor rather than dull drudgery. Your fund of knowledge and your power of lucid expression are at once our joy and our despair. From our mere seventy-five-year mark we hail you as one who has drunk deep not only of the Pierian Spring but also of that sought by Ponce de Leon.



Seated: Professor Samuel Williston and Mrs. Olive G. Ricker; Standing: Judge E. J. Dimock and J. N. Welch.

On behalf of your students, so many of whom are among its members, the American Bar Association has caused its President to execute the foregoing at Boston, on the twenty-fifth day of August, nineteen hundred and fifty-three.

American Bar Association
By Robert G. Storey
President

AMERICAN BAR ASSOCIATION

*Journal*

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## ■ *Service*

In his Annual Address, delivered in Boston, President Storey made this important statement:

"The Bar Center will be completed and dedicated in August, 1954, during our next Annual Meeting. We therefore take pride in dedicating this year as marking the beginning of a new era for the American Bar Association—the Era of National Service."

Others too have called attention to the importance of upholding the ideal of service:

"The practice of the law is a profession. Those who follow this profession, especially educated and trained, if they are worthy, will recognize always that their objective must be service. Unfortunately, they are not endowed, nor are they subsidized and therefore they will of necessity require some compensation for what they do. But this consideration should never be allowed to crowd out the high ideal of service,—service to clients, to their fellows in their profession, to the profession as a whole, to the public, to the nation, and to the welfare of mankind."

All who are served by us are of the public and so whether we call this National Service or Public Service comes to the same thing. It is this service which makes our occupation a profession and entitles us to the privilege of representing others in legal matters in or out of court. For license is given us to practice law not as a right but as a privilege. And it is the public who, through their legislatures and their courts, determine upon whom they shall bestow this privilege. So long as we are not derelict in our duty to serve well the public, we need have no fear that public confidence will be denied us.

We are selected, however, for the honor of being allowed to practice law not because we are "lawyers", but because by education and training and tradition we are deemed worthy.

## ■ *Fair Trial and a Free Press*

The necessity of preserving all the safeguards of a fair trial and at the same time assuring the freedom of the press has been critically emphasized lately in trials where courts have taken it upon themselves to exclude the press where it appeared to the judge that the morals of the public might otherwise be damaged.

The balance between these two vital rights has been intelligently and comprehensively discussed in a recent paper by Edwin M. Otterbourg, published in this issue beginning at page 978, and in the prize-winning Ross Essay by Mrs. Lois Forer, published in our September issue beginning at page 800.

We should never suggest that adequate coverage by the press of facts developed and procedure followed in any trial should ever be curtailed. Members of the press, however, should school themselves against the temptation to make conscious effort to influence the decision in a pending case by their manner of reporting.

One aspect of public trials has not been discussed as much as it might have been. Trials are not open for the sake of making a Roman holiday for the public. The purpose of admitting the public is to protect litigants. Were it permissible for courts to conduct trials behind closed doors, there would be nothing to prevent pursuit of the old star-chamber methods and practices.

This is why the press is encouraged to report in orderly and restrained manner all court proceedings.

The sacred rights of press and litigant are covered by the First and Fifth and Fourteenth Amendments to the Constitution; and in criminal cases by the provisions of the Sixth Amendment.

There rests, then, upon the press on the one hand and the courts on the other the duty to refrain from taking or permitting any action calculated to trespass upon or deny in any way these respective rights so carefully and specifically protected by the Constitution.

## ■ *American Law Student Association*

On February 1, 1949, at the Mid-Year Meeting of the House of Delegates, there was included in the report of William R. Eddleman, Chairman of the Junior Bar

Conference, a resolution recommending that the Conference be instructed to sponsor an American Law Student Association with a constituent student association in each approved law school. The make-up of the governing body was provided in the resolution which also contained a provision that the House of Delegates of the new organization should meet annually at the time and place of the Annual Meeting of the American Bar Association. The Board of Governors moved the adoption of another resolution continuing the Special Committee on the Relations of the American Bar Association with Law Students. The resolution also called for collaboration by the JOURNAL and the Council of the Section of Legal Education.

Both of these resolutions were adopted by the House and the movement for the formation of the new organization was fairly launched.

It is an interesting sidelight on the operations of the organized Bar that it moves slowly in achievements of importance, but its progress is nonetheless steady and sure. It would have reflected great credit on our Association could we have been farsighted enough to recognize long before we did, the opportunities ahead of an organization like the Law Student Association and the brilliant record it was to make for itself.

When the American Bar Association met in St. Louis in September, 1949, the law students were already prepared and proceeded to hold the organizational sessions of their new association. Charles W. Joiner, as Chairman of the Committee on Relations with Law Students, reported that 107 law student representatives from almost fifty law schools attended.

James M. Spiro reporting for the Law Student Association's meeting in connection with our recent Diamond Jubilee Meeting in Boston, calls attention to the fact that fifty-eight approved law schools were represented and that the 133 members of the new association's House of Delegates were introduced to our Assembly by our illustrious President, Robert G. Storey. David F. Maxwell presented to these future lawyers the greetings of our House of Delegates over which he so ably presides.

These young men made a splendid impression. They were earnest and eager and brought to their tasks great enthusiasm, fine intelligence and very evident appreciation of the importance of their undertaking.

We salute them for what they have accomplished in a short span of years and because we know how well they understand their responsibilities and what important contributions they are destined to make in the affairs of the American Bar Association. They are the lawyers of the future and it is to them we must look to continue our worthy traditions, to carry on our work, to improve on our methods and progress far beyond our present goals.

## *Invocation Delivered at the Opening Session of the Diamond Jubilee Meeting*

### by the Most Reverend Eric F. MacKenzie, Auxiliary Bishop of Boston

■ Father in Heaven, All-mighty, All-just, All-merciful and All-loving, we ask Thy blessing on the Convention of the American Bar Association, now beginning. For the seventy-sixth time, lawyers have come together from every part of our nation and even from abroad, to consider together what they may do in the face of a thousand urgent problems. They come also to renew old friendships and, in happy association, to make stronger their fraternal professional ties.

Father, we recall happily that Thy Son, our Lord, incarnate here on earth that He might lead our sinful race back to Thy house of many mansions, despite this supreme preoccupation and purpose, watched and loved and drew lessons from the birds of the air and from the beauty with which were clothed the flowers of the field. We recall how simply He joined in a marriage feast and shared the homely happiness of a peasant couple in Cana. Bless then, Father, the members of this Convention when they too find pleasure and relaxation in the recess hours of this Convention. Give them happiness and rest and renewal of strength and courage and energy.

But beyond this, Father, we ask Thy blessing especially upon the labors of this Convention. The members of the Bar are here, conscious of their responsibility to Thee and to our nation, serious and determined in their will to find prudent and appropriate answers to their problems. Grant them not merely a happy and friendly association, but vision and understanding. Grant them to see their problems, not in terms of their individual selfish interests, their personal fortunes and reputations, their position and power, but rather objectively and generously, in terms of the common welfare of all.

Father, the Convention has chosen as its central theme "Liberty Under Law". Grant to this Convention the most appropriate exemplification of this principle. With many men, there are many minds, diverging in experience and temperament. Let there be the utmost respect for these differences and a courteous readiness to hear and understand the most varying views. But, along with this liberty, let there be a higher unity of purpose, a recognition of the need of devotion and zealous service to the common good. Let the Convention be filled with men who vie with each other to express the truth which they know and the prudent solutions which they advocate; but let the Convention end with a single purpose: to make the Bar an instrument, under Thee, to promote the common weal, locally, nationally, and in all our troubled world.

In humble devotion and reverent faith, we ask this of Thee, Father: Thy blessing and guidance and inspiration. Grant it to us, in the name of Christ Thy Son. Amen.

# William Eugene Stanley, 1891-1953

■ William Eugene Stanley, of Wichita, Kansas, long a colorful and active figure in his own state, as well as in the American Bar Association, died suddenly of a heart attack on the 26th day of September, 1953.

Gene, as he was well and familiarly known to his countless friends in legal circles, was born at Wichita, Kansas, on April 30, 1891, and was in his sixty-third year at the time of his death. His family had long been closely identified with the life and history of his native state and his father, after whom he was named, served as the fifteenth Governor of Kansas.

Gene was educated in local schools and at the University of Chicago, where he received the degrees of Ph.B. and J.D. He was thereafter admitted to the Kansas Bar in 1914 and continued to practice law as an active member of that bar until his death, except for a period during World War I when he served as a first lieutenant in the United States Army. He was a member of the firm of Depew, Stanley, Weigand, Hook and Kurfman. He is survived by his widow and one daughter.

Gene's association with the American Bar Association was long, close and intimate. His father-in-law, Chester I. Long, with whom he was associated as a lawyer, served as President of the American Bar Association in 1925-26. Gene became a member in 1920 and for the greater portion of his practice was a participant in the varied activities of the Association. His face and voice became familiar and well known to practically every member of the Association who, during the past quarter of a century at least, had attended the Annual Meetings of the Association or of its House of Delegates. The list of Gene's many activities in the Association are too long to enumerate in detail but among the more important are the following:

A member of the House of Delegates continuously since 1937 in various capacities; as State Delegate, member of the Board of Governors and, at the time of his death, as Assembly Delegate.

A member of the Board of Governors from 1942 to 1945.

A member of the Council of the Insurance Section from 1932 to 1936, and Chairman in 1936.

A member of the Council of the Section of Legal Education and Admissions from 1931 to 1942, and Chairman in 1941.

A member of the Council of the Section of Bar Activities from 1937 to 1940.

Chairman of the Committee on Ways and Means since 1946.

A member of the House Committee on Rules and Calendar since 1945.

A member of the Finance Committee of the American Bar Foundation since its organization in 1952.

A member of the Committee on Selection of Site for the American Bar Center, 1951-1952.

A member of the Conference of Commissioners on Uniform State Laws since 1936; Vice President from 1940 to 1943, President, 1943-1944 and 1946-1947, and chairman of the Executive Committee from 1947 to 1949.

Gene had for many years also been an active member of the American Law Institute and of the Inter-American Bar Association, some of whose meetings he attended. He was equally active in The Bar Association of the State of Kansas and was also a member of the Wichita Bar Association. In his state bar association he served as Editor of the *Journal of The Bar Association of the State of Kansas* from 1921 to 1940, and as Secretary of the Association from 1920 to 1939, and as its President in 1940.

Notwithstanding his many responsibilities in his own state and in the American Bar Association and his work as a Commissioner on Uniform Legislation he continued to be active in private practice as a member of his law firm and was also prominent in various local, civic and fraternal organizations in his home community and state. He was a dynamic, forceful figure and made his influence felt in every single activity with which he was identified.

The American Bar Center, which is now in the course of construction, represents the active interest and cooperation of a great many lawyers but none more than Gene Stanley. For many years Gene, as Chairman of the Committee on Ways and Means, was untiring in his efforts to raise funds for the Association. As a direct result of this activity on his part there was accumulated prior to 1952 a substantial amount of cash in a building fund which was immediately available for the use of the new Bar Center when preliminary work thereon was started.

Without the services of Gene Stanley the American Bar Association would most certainly not now be in its present sound, financial position. He was a valuable and useful citizen. His death represents a distinct loss to his home community, to his state and to his nation. Especially will he be missed in the House of Delegates and in the councils of the American Bar Association. He will not soon be forgotten. During his active life he made a record of outstanding public service that will long survive his passing.

ROY E. WILLY
Sioux Falls, South Dakota

# Law Students at the Diamond Jubilee Meeting

■ During the recent celebration of the American Bar Association's Diamond Jubilee in Boston, one of the activities which attracted special favorable attention was the program of the American Law Student Association. Participants in the four-day meeting of the student association, founded four years ago under the aegis of the American Bar Association, included outstanding lawyers, jurists and educators as well as law students representing fifty-eight approved law schools.

The purpose of the meeting was to provide the nation's future lawyers with an opportunity to discuss their common problems, to obtain the views of members of the profession on matters of current legal interest and to become familiar with the work and importance of the organized Bar.

The event's significance to the legal profession was emphasized by American Bar Association President Robert G. Storey when he introduced the 133 members of the ALSA House of Delegates to the members of the American Bar Association Assembly at the opening of the first session of the Assembly on August 24. This thought was echoed that same day by David F. Maxwell, Chairman of the American Bar Association House of Delegates, at the ALSA Annual Luncheon in the Bradford Hotel.

In presenting the greetings of the House of Delegates of the senior Association, Mr. Maxwell said that group was "terrifically inspired by the fine showing that you have here at this meeting. We think it is a splendid record and a true indication of the real interest that you youngsters, when you come to the Bar, are going to take in the affairs of the organized Bar."

One of the features of the meeting which proved attractive to many members of the senior association was a legal film program. The feature films shown were *Justice* and *The Nuremberg Trial and Its Lesson for Today*. The former was a kinescope of an April, 1953, dramatic television program about legal aid, with an introduction by Judge Learned Hand.

Of special import was a panel discussion, which took place on Sunday, August 23, on the frequently proposed "Legal Internship Program". Lawyers and educators have given considerable attention to the question of whether or not today's law graduates have sufficient practical training. They have not, however, generally obtained the thinking of law students. The panel discussion was scheduled so law students would have a chance to hear current views on the subject and reach determinations of their own. Panelists were Dean E. Blythe Stason of the University of Michigan Law School, Professor Lawrence N. Park of Temple University Law School, and Judge Mark E. Lefever of the Orphans' Court in Philadelphia. Professor William Kelly Joyce of the University of Detroit School of Law served as moderator.

Although no final decision was reached by the panel, students were extremely interested in the views expressed by the panelists. Since Professor Park had served on the Board of Bar Examiners in New Jersey and Judge Lefever had served with the Pennsylvania Board of Bar Examiners, and both New Jersey and Pennsylvania have a form of legal internship, their views received particular scrutiny by the delegates. General consensus was that some form of practical training of law students was very necessary, although the best means of achieving it was still open to debate.

Two days later student delegates heard a discussion of another proposed change in legal education and admission to the Bar—the adoption of a "Nationally Administered Bar Examination".

Moderator of this panel was Herbert W. Clark, San Francisco lawyer and former Chairman of the Section of Legal Education and Admissions to the Bar. Five present or past members of state bar examination boards and Everett S. Elwood, Editor and Consultant on State Board Relations of the National Board of Medical Examiners in Philadelphia, Pennsylvania, served as panelists. The lawyers were Eugene Glenn, of San Diego, California, former President, National Conference of Bar Examiners; George Neff Stevens, Seattle, Washington, Dean of the University of Washington School of Law; Will Allen Wilkerson, Chattanooga, Tennessee, Vice President, Tennessee Board of Law Examiners; Professor Shelden D. Elliott, New York City, former Secretary, California Committee of Bar Examiners; and John T. DeGraff, Albany, New York, President, New York State Board of Law Examiners.

Considerable disagreement developed about the wisdom and practicality of a national examination. From the experiences of the medical profession it was obvious that some form of national examination was feasible, provided the states still had an opportunity to give an examination of their own. The discussion is believed to have brought together enough of the current thinking to provide a basis for at least preliminary decision on acceptance of the proposal.

Speaking at the ALSA Annual Luncheon on Monday, August 24, New Jersey Supreme Court Chief Justice Arthur T. Vanderbilt described the "Five Functions of the Lawyer". These, he said, were (1) to be able to try a case, (2) to be a wise counselor, (3) to aid in improving the administration of justice, (4) to be a wise leader of public opinion, and (5) to be prepared for public service when the call comes. Of these functions, improving the administration of justice was singled out for special emphasis.

To the audience of almost 180 people Justice Vanderbilt noted that the need to improve the administration of justice is a responsibility resting upon the lawyer "not beginning with his admission to the Bar, but from the very day he enters law school". Getting rid of the delays of the law, eliminating unnecessary technicalities of procedure and pleading, and improving the quality of the judiciary, he said, will do much to increase the confidence of the public in our system of justice.

Among those in attendance at the luncheon were the Honorable John Hackett, former President of the Canadian Bar Association; Chief Justice Edmund H. Lewis of the New York Court of Appeals; Associate Justice Albert Kiway of the New York Court of Appeals; Stewart F. Hancock, of Syracuse, New York; David F. Maxwell, Philadelphia, Pennsylvania, Chairman of the House of Delegates; and Ross L. Malone, of Roswell, New Mexico, member of the Board of Governors.

Mr. Malone, who served as Chief Judge of the 1953 ALSA Student Bar Award Competition, presented plaques to the winning organizations. The Creighton University Student Bar Association was selected as "The Most Outstanding Member Student Bar Association in the United States". The student bar associations of Ohio State, St. Mary's, and Temple received certificates as outstanding member student bar associations.

The Massachusetts Bar Association and the Boston Bar Association were hosts at a special reception for ALSA delegates and their friends on Saturday evening, August 22. Several hundred people gathered in the Reception Room of the Bradford Hotel to get acquainted and enjoy the refreshments and entertainment. Among the special guests present were American Bar Association President Robert G. Storey, President-Elect and Mrs. William J. Jameson, and a number of the law school deans.

The ALSA House of Delegates held sessions on August 23, 24 and 25. Deliberations included action on committee reports, organization of a new program for the following year, and election of new officers. The new President is Bill E. Brice, of Southern Methodist University. Lester L. Bates, of the University of South Carolina, was elected Executive Vice President, and Edward J. Regan, of Boston College, was chosen Second Vice President. Miss Nancy-Nellis Warner, of Catholic University, and John H. Morris, of Loyola University, Los Angeles, were named to the respective posts of Secretary and Treasurer.

Members of the House were honored by special addresses given by the new President of the American Bar Association, William J. Jameson, and the Director of the Survey of the Legal Profession, Reginald Heber Smith. Both men stressed the importance of participation in the work of the organized Bar and the interest of the organized Bar in helping the law students to become sound, successful members of the profession. Each of the speakers received a standing ovation.

During the afternoon of August 24, student delegates participated in the program of the Conference on Personal Finance Law. A special attraction was an appellate court argument on the question of whether lenders should be compelled to join "closed" lenders' exchanges. Judges were Dean Albert J. Harno of the University of Illinois College of Law; Frederick L. Hall, Lieutenant Governor of Kansas; and Rear Admiral Ira H. Nunn, Judge Advocate General of the United States Navy.

The Association's Annual Dinner was held on the evening of August 25. Speakers at this gathering were former American Bar Association President Howard L. Barkdull, and William Scott Stewart, of Chicago, Illinois, who spoke on "Criminal Law and the Young Lawyer". The dinner was concluded with the presentation of special awards to the officers and committee chairmen of the Association who had done exceptionally outstanding work during the prior year.

The ALSA Board of Governors met on Saturday, August 22, and again on Wednesday, August 26, to take action on the formation of committees, the approval of committee recommendations, and the passage of amendments to the Constitution and By-Laws. Approval was given to the appointment of a special committee to work in the audio-visual field with the Association of American Law Schools and the National Legal Audio-Visual Center.

Through their participation in these numerous events the nation's law students have been learning at firsthand about the work and problems of bar organizations. The interest in law students shown by so many leaders of the legal profession, and the fine work accomplished by the law students themselves indicate the importance of the work being accomplished with the nation's embryonic lawyers.

As expressed to the law students by the Chairman of the House of Delegates of the American Bar Association, David F. Maxwell, "We hope from your experience in the American Law Student Association that you will obtain the background and knowledge to become delegates of the senior association before too many years." The legal profession echoes this hope, for it is today's students who must be the leaders of tomorrow's Bar.

JAMES M. SPIRO
Director, American Law Student Association

# Books for Lawyers

LEGAL EDUCATION IN THE UNITED STATES. *By Albert J. Harno. San Francisco: Bancroft, Whitney Company. 1953. $3.50. Pages 211.*

Legal education has long engaged the attention of the American Bar. The law reviews, the bar journals and the legal newspapers are studded with articles on the subject, and the *Journal of Legal Education* and its precursor, the *American Law School Review*, as well as the annual *Handbook of the Association of American Law Schools*, are devoted exclusively to it. Then there are the monumental studies of Redlich on *The Common Law and the Case Method* (1915), of Reed on *Training for the Public Profession of the Law* (1921) and *Present-Day Law Schools in the United States and Canada* (1928), all sponsored by the Carnegie Foundation, and Brown's *Lawyers, Law Schools and the Public Service* (1948), published under the auspices of the Russell Sage Foundation. The literature of legal education is legion and one who would know something about it—and what intelligent judge, lawyer, law teacher and law student would not?—is hard put to know where to begin, if he does not intend to devote an inordinate amount of time to the subject, especially as so much of what has been written on the subject is controversial in spirit, provincial in outlook and seemingly unaware of what is transpiring contemporaneously in other professions.

To all searchers for insight into the problems of legal education, Dean Harno's new volume is a satisfying answer within the modest compass of 197 pages. The book should interest not only every branch of the profession but also all the college professors who are preparing students for law school, for who can deny that much of the preparation for law school and pre-legal counseling of today in many of our colleges comes perilously close to being a case of the blind leading the blind? Dean Harno's book not only embodies a lifetime of experience in legal education, but it also springs from intimate familiarity with the problems of the legal profession, on the one hand, and, on the other, with what is being taught and the way it is being taught in the colleges.

The outstanding merits of Dean Harno's work are its conciseness, its clarity, its perspective and its freedom from controversy or bias. The history of American legal education is long and intricate, and it would have been easy to have become enmeshed in details or to have gone off on tangents. Fortunately for us all, the author sees his subject as a whole from beginning to end.

The grand traditions of the Inns of Court as delightfully depicted by Chief Justice Fortescue in the fifteenth century were in complete eclipse two centuries later. Legal education then became truly self-education, with only the most discouraging texts available to students until Blackstone published his *Commentaries* in the 1760's. Blackstone not only "rescued the law of England from chaos", but he came at just the right moment to prevent the common law from being submerged in America. The author evaluates concisely the great influence of Blackstone in this country not only through his *Commentaries*, which complemented the traditional law clerkship or apprenticeship which otherwise would in most cases have been a barren experience, but also through the inspiration which his success in teaching English law at Oxford gave to the establishment of similar professorships here. The able men who sought to emulate his example here—George Wythe, James Wilson, James Kent, and David Hoffman among others—conceived of legal education as he did as "part of a liberal education". Their broad concept of legal education was not, however, generally accepted in an era in which an apprenticeship was the prevailing mode of admission to the Bar, but their idea nevertheless struggled on in several of our colleges until the advent of Judge Story as head of the Harvard Law School. He assumed, contrary to fact in most instances, that his students had a liberal education before coming to law school, and the force of his personality and prestige, of his scholarship and success was such that the example he set of narrow professional training was followed without question for almost a century, to the great detriment of American legal education.

Dean Harno recognizes more clearly than have most writers the pivotal fact of Story's influence on the scope of legal education. He also stresses the beneficent influence of Dean Langdell's case method of law study, which has dominated legal education in this country for the past three quarters of a century. There is something truly heroic in Langdell's faith in the result of sending his students to the sources of the law and in his conviction that thus and thus only could they be taught to reason as judges and lawyers do. Although the use of the case system beyond the first or second year of law school has been under attack in recent years, no one would dream of denying beginners in the law the challenging experience of grappling with the decisions of the courts while they are learning the fundamentals of our legal system. It is the case system as Langdell employed it that has been the crowning glory of American legal education.

Dean Harno's account of the impact of the American Bar Associa-

tion on the improvement of legal education is a story that must be read by all who would understand the history of legal education in this country, and Dean Harno from his many years of service in the Section of Legal Education and Admissions to the Bar of the American Bar Association is well equipped to tell it. Slowly, step by step, with almost infinite patience, the organized Bar acting in the public interest has forced on reluctant states and selfish law schools better—but still imperfect—standards of legal education, of prelegal education and of admissions to the Bar.

For the past year or two, considerable heat seems to have been engendered by criticism of legal education. To one now removed from the fray by the judicial role, it seems that in this controversy the law schools have assumed a considerable burden that they might well have cast on the other branches of the legal profession. Why should not the Bench and Bar long since have simplified the organization of courts, improved the selection of judges and juries and developed the art and science of judicial administration that would have eliminated needless delays in the administration of justice and decisions based on technicalities and surprise rather than on the merits of the particular controversy? Of course, if the judges and lawyers will not attend to their responsibilities in these fields, as they seemingly will not in some jurisdictions, the law schools must begin to enlighten the oncoming generations of lawyers. But I must not venture into this arena. Suffice it to say that the chapter on "Criticism of Modern Legal Education" is unrivaled in its freedom from heat, its breadth of vision and the reasonableness of its point of view. The same observations may be made in like degree of the concluding chapter "A Present Appraisement". These two chapters constitute the heart of the volume. These chapters in particular, with the whole book as background, should be read and studied by everyone concerned with legal education, from university presidents to prospective law students, from prelegal advisers to bar association officials and newspaper editors, if we are to bring forth the kind of lawyers the second half of the twentieth century needs.

And let none be deceived by the fact that the book is easy enjoyable reading. A wealth of ore in the form of study and experience, of reflection and selection had to be processed to bring forth the pure gold of this book.

ARTHUR T. VANDERBILT
Chief Justice,
Supreme Court of New Jersey

THE LAWYER FROM ANTIQUITY TO MODERN TIMES. *By Roscoe Pound. St. Paul: West Publishing Company. 1953. $5.00. Pages xxxii, 404.*

This is a book which, I suspect, could have been written only by Roscoe Pound. The breadth of learning, the knowledge of Greek, Roman, European, English, and American history, philosophy and law, demonstrated many times obliquely and in an almost off-hand manner, mark this work indisputably as Pound's. Tracing the development of the legal profession from ancient Greece through Rome and in the ecclesiastical courts and in tribunals of the civil law of the Middle Ages in Europe, it is concise and most scholarly. This is followed by a competent outline of the history of the profession in England and in America.

The history of the profession in the United States is divided into several parts. The first deals with the rise and organization of lawyers in colonial America. During this century and three quarters from the first settlement to the Declaration of Independence, there were in general four stages: (1) the early suspicion of and attempt to get on without lawyers; (2) the stage of irresponsible filling out of writs by court officials and pettifoggers; (3) the era of admitted practitioners in permanent judicial organization; and (4) the era of trained lawyers—the Bar of the eve of the Revolution.

Then follows an interesting and informative discussion of organizations of the Bar during the formative era—from the Revolution to the Civil War; the era of decadence—roughly from 1836 to 1870; and the revival of professional organization following 1870. Here one finds an authoritative report of the history of local and state bar associations. The book is indispensable for this history alone.

But the Epilogue is Pound. The practice of law as a profession "should be carried on by an organized body of men pursuing a common calling as a learned art in the spirit of a public service" (pages 353-354). He shows how the meaning of "profession" has been changed by some to include different businesses and even sports. This is not the "profession" of law as Pound defines it. He sounds a sobering warning about further growth of the service state. Carried to its logical extreme, the advocates of a bigger service state must conclude that all public services of every sort will be exclusively governmental functions to be exercised by government bureaus. "The difference between a public service performed by a profession and a public function performed by a bureau is crucial" (page 356).

The book is scholarly. The statistics on state and local bar associations are monumental and invaluable, and form an essential component of the Survey of the Legal Profession. The Epilogue alone is worth the price of the book. It is Pound. It is wisdom.

L. DALE COFFMAN
Los Angeles, California

FRAUD UNDER FEDERAL TAX LAW. *Second Edition. By Harry Graham Balter. Chicago: Commerce Clearing House, Inc. 1953. $7.50. Pages 495.*

The income tax is a notoriously volatile branch of the law, but most of its phases have crystallized within the last couple of decades to a reasonable degree of coherence and predictability. Nevertheless, one aspect of the subject which appeared for a

time to be fairly quiescent has burgeoned mightily within the past few years.

Tax fraud has always been with us, but a combination of many factors has recently shoved it high on the list of litigated issues. Confiscatory surtax rates and a complex tax law have aggravated the normal temptations for the weak, the cunning and the corrupt. On the other side, righteous indignation against tax evaders on the part of honest citizens themselves squeezed by high taxes, and the needs of a hard-pressed Treasury for the large amounts at stake, have forged an ever-tightening enforcement policy by the administration. The result has been a widening circle of border-line cases, involving difficult issues of substantive and procedural law with respect to both criminal and civil penalties.

Tax fraud, in one aspect, is a specialized corner of the highly specialized field of the tax law. In another aspect, it cuts across taxation to the wider realms of tort and criminal law. Put another way, it is almost impossible for a lawyer to handle a tax fraud case without knowing the tax law; but it is equally impossible for the tax specialist to do justice for his client within the framework of the traditional tax case. This, in a field which is growing and shifting almost daily, presents a new challenge to the profession.

The present book serves a real need, especially for the lawyer with his first tax fraud case. The author has the perspective of experience, and he has assiduously collected all the authorities. He quotes extensively from the leading cases, and he quotes and cites a large mass of collateral reading. The organization of the book is logical, the writing is adequate and the recommendations are practical. One could wish that the author's conclusions were more pointed in many places, but the major blame on that score must be placed on the confused present state of the law. The number of important cases which have been decided in the few months since publication indicate that a third edition should be soon under way.

MARK H. JOHNSON
New York, New York

THE DOCTRINE OF THE SEPARATION OF POWERS. *By Arthur T. Vanderbilt. Lincoln: University of Nebraska Press. 1953. $2.50 Pages 144.*

When a great lawyer like Chief Justice Arthur T. Vanderbilt of New Jersey writes on a legal subject, his ideas merit attention. Because he is an author, law teacher and judge—as well as the leading reformer of the judicial system of his state, special attention is due him. When his topic is the knotty one of the separation of powers in our Federal Government, we are all involved, because we are all affected. Chief Justice Vanderbilt's latest book contains his three addresses in the Roscoe Pound Lectureship Series at the University of Nebraska. He was chosen as the second lecturer, the first being, quite naturally, "the Schoolmaster of the American Bar", Roscoe Pound himself.

Justice Vanderbilt's purpose, in his own words, was this:

> I have attempted to appraise the present-day significance of the doctrine of the separation of powers. The gigantic problems confronting us are not impossible of solution. Individual freedom and the progress of civilization are attainable, but only if each of the three branches of government conforms to the constitutional principles of the separation of powers.

In making his appraisal, the author first views the doctrine of separating government powers into three branches—legislative, executive and judicial—historically and on a comparative law basis. In addition to reviewing some familiar American history on the subject, he compares foreign experience on the point. He includes Russian, German, French and Latin-American viewpoints. He has little sympathy for former Dean James M. Landis' ridicule of the doctrine of the separation of powers. "The independence of the judiciary", says the Chief Justice, "is the best test of the actuality of the rights of the individual." The Soviet concept of the judicial function rejects the American doctrine. "The plain truth is that no authoritarian regime can tolerate the limitations on its powers that are implicit in the doctrine of the separation of powers." These crucial points the Chief Justice makes amply clear by his comparative analysis and by examples from foreign constitutional legal systems.

His second chapter is devoted to a discussion of the effect of two major twentieth century legal developments. The first is the dominance of the Federal Government over the states. The second, the dominating position of the executive over the legislative branch. Each he regards as a powerful threat to the doctrine of separation and, consequently, to individual freedom. He has no naïve awe for administrative agency "*expertise*". He agrees with Harold Laski that no body of experts is wise enough or good enough to be charged with the destiny of mankind. With true Vanderbiltian passion for clinching a point by citing significant statistics, he demonstrates the growth of our Federal Government and concludes: "No government, no matter how well organized, is capable of operating efficiently on such a gigantic scale." The inevitable result, he believes, is an increasing encroachment on state, local and private interests. The author is particularly anxious to see that individual freedom, properly restricted in wartime emergencies, is returned to the citizens uncurtailed after the emergency is over. Arthur Vanderbilt is still opposing, as he has for years, the commingling of the prosecuting and the adjudicating function in the same administrative agency heads. He urges the legislatures to respect the inherent wisdom of the doctrine of the separation of powers.

The last chapter is devoted to the problem of judicial abnegation. New Jersey lawyers are well aware that their Chief Justice is no judicial abnegator! The judiciary, the weak-

est of the departments of government, is least able to defend itself against the hostility or encroachments of the legislature or the executive. The author does not omit significant comment on judicial rule-making, a field in which he speaks as a pre-eminent authority. In this area he has long been an opponent of legislative interference with judicial prerogatives. He believes that judges should not have nonjudicial duties imposed upon them by legislatures. Recently courts themselves in their own decisions have been limiting their own field of function. "Should the weakest branch of the government on its own initiative weaken itself still further at the expense of the clear rights of citizens under the Constitution?" he asks. The question answers itself!

Chief Justice Vanderbilt's latest book is a thoughtful presentation by a national authority on a crucial constitutional doctrine—a subject suggested to the author by Roscoe Pound himself. Though limited to three chapters, New Jersey's Chief Justice has made a valuable and lasting contribution to a subject vital to the political foundations upon which our government and liberties rest.

EUGENE C. GERHART
Binghamton, New York

THE LEGISLATIVE STRUGGLE. *By Bertram M. Gross. New York: McGraw-Hill Co. $6.50. 1953. Pages xviii, 472.*

Lawyers who are critical of the "impracticability" of their fellow social scientists will be surprised and delighted with Gross' penetrating analysis and realistic description of the federal legislative process.

The subtitle of the book "A Study in Social Combat" sets forth the author's sound thesis that the legislature as an institution plays only a part, and often a small one, in the process by which society formulates its rules of conduct. Thirteen of the twenty-one chapters deal with the ways and means by which private organizations, political parties and government agencies seek to control the ultimate legislative decisions. The remaining chapters disclose the manner in which these forces and pressures influence the committee hearings and the formal legislative procedures of the two houses of Congress. In detail and with candor, the author discusses the means of organizing pressure groups, the selection and coaching of witnesses for committee hearings, the means of delaying or expediting legislative action, indeed, all the trial techniques of legislative advocacy. He sounds a warning, well known by all experienced legislative counsel, but generally unbelieved by those without congressional experience, that there is no greater folly than to assume that the Congressmen are uninformed, that the hearing is a formality, or that inaccurate or misleading statistics and evidence will not be discovered.

In the introduction the author warns that there are no absolute standards (including his own) by which any social process may be judged, and it might be added, particularly the legislative process—a warning which lawyers particularly should heed. Although, as a profession, lawyers have participated in the legislative process, both officially and unofficially, more than any other single group, paradoxically they are usually the most contemptuous of it and often the least informed concerning it. Contrasted with the judicial process it does often appear to be unpredictable, haphazard and unreliable. There are no formal rules of precedent, *stare decisis*, and review. But the initiate will soon discover that they are there. In its broadest sweep and with all its faults, the legislative process achieves the constitutional objective of a representative democracy. Individual judges and executives by force of their own personalities have on occasion and for limited periods in our history achieved popular representation through their leadership; but institutionally, the legislature for good or ill, has most accurately reflected the kind of society that we are—though not necessarily the kind of society we want to be or ought to be.

It is difficult in so short a review to give the full flavor of this excellent volume. Perhaps this analogy will make the point. Every experienced lawyer tends to reminisce concerning his experiences with the judicial process, with judges, juries and opposing counsel. If he has been an able lawyer, his insights into human experience and the forces at work within and without the judicial system provide a manual of judicial strategy and tactics invaluable to the successful practice in his jurisdiction. In a sense, Gross has reminisced concerning his broad experience with the many forces—formal and informal—which initiate, obstruct and produce legislation. Gross is able and experienced, and his volume is not only delightful reading for those with only a layman's interest in legislation but also an indispensable text for those who wish to improve their skills as legislators or legislative counsel.

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CRIME INVESTIGATION. *By Paul L. Kirk. New York: Interscience Publishers, Inc. 1953. $10.00. Pages 806.*

As a text on physical evidence and the techniques of a police laboratory, this book is one of the better publications of its kind now available. It is not one of those highly scientific, difficult-to-understand books, but on the contrary, is a readable, elementary discussion of a large number of types of examinations conducted of physical evidence in criminal investigations.

A commendatory feature is the concreteness and clarity of the presentation. It is adequately illustrated with photographs, figures, drawings, tables and references.

For the lawyer and judge, it is a handy reference work, as it describes in adequate detail and easy-to-understand language the exact steps taken in the examination of physical evidence in criminal cases. Excellent

for prosecution and defense attorneys in preparing for the use and questioning of expert witnesses.

For the police officer and investigator, it is a textbook of value in that it covers the wide field of physical evidence that may be found at the scene of a crime. It details not only what to look for, but the proper steps to be taken in the photographing and preservation of the evidence found.

The student, professional writer and layman will find it of considerable reference value in that it is scientifically sound and adequately covers the field in nonscientific language.

It is of very limited value to the chemist and other expert scientists in view of its elementary treatment of scientific procedures. One possible drawback of the book is that it might encourage poorly qualified technicians in law enforcement work to attempt treatment and analyses for which they are not qualified. Sound scientific examination of physical evidence calls for experts, rather than jacks of all trades. It is likewise of limited value to the experts in the field of fingerprint and document examination.

Section I of the book is of particular interest to the general reader and student of the subject. It outlines what to look for as being pertinent to the investigation at hand. It covers the field adequately, including fingerprints, hairs, soils, inks, heel prints, tiremarks, guns, blood, poison, and so forth. It also outlines equipment of the investigator and the use of such equipment.

Section II is of interest to the student, lawyer, professional writer and others who need to know how physical evidence is handled in a scientific laboratory.

The book has adequate references and indexing.

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DICTIONARY OF PSYCHIATRY AND PSYCHOLOGY. *By William H. Kupper, M.D. Patterson, N.J.: The Colt Press. 1953. $4.50 Pages 194.*

ENCYCLOPEDIA OF ABERRATIONS. *By Edward Podolsky, M.D. New York: Philosophical Library, Inc. 1953. $10.00. Pages ix, 550.*

These two volumes, using the dictionary-encyclopedic approach, attempt to introduce the intelligent nonspecialist to the mental sciences (psychology, psychiatry and neurology). The first, a thin, concise supplement to the medical dictionary, uses the alphabetical approach and presupposes a working knowledge of the nomenclature and language of psychiatry and psychology. The second, an encyclopedia of signed articles, treats successively the various general groups of aberrations—sexual, emotional, religious, social, sensory, intellectual and perceptive.

Neither volume has an index. Accordingly, a neophyte may have trouble locating the discussion of the subject in which he is interested. However, once he has overcome this barrier, he will find the material clear, compact and informative; this is particularly true of the Kupper *Dictionary*, which is exceptionally compact. The Podolsky *Encyclopedia* generally uses the case-method in introducing each subject; the usefulness of this method is beyond dispute, but it is often space- and time-consuming out of proportion to the generalized knowledge which it yields. Though not as succinct as the *Dictionary*, the greater bulk of the *Encyclopedia* and the inclusion of signed contributions by fifty-nine eminent mental specialists give to it a range and comprehensiveness not possible in the smaller work.

One informative comparison may be made in the treatment given the "phobias" by the two works; in the *Dictionary*, for example, "ailurophobia" (fear of cats) and "gynephobia" (fear of women) are given these definitions at the proper, alphabetical locations without further comment, but in the *Encyclopedia* a five-page, double-column article discusses fully "Phobias: Their Nature". As the *Dictionary* does not discuss phobias topically, nor the *Encyclopedia* list them specifically by name, the two books supplement each other.

As far as the reviewer is aware, both books seem to reflect recent developments in the mental sciences. For example, the use of electroshock therapy in the psychoses and of gamma globulin in infantile paralysis are evaluated. These books were not written primarily for lawyers, though the language and technical concepts are not so involved as to destroy their usefulness to lawyers. Their appeal will be to a small segment of the Bar, to medicolegal specialists, and to those having more than a passing acquaintance with the mental branches of medicine. Lawyers generally will find these books, particularly the *Encyclopedia*, "difficult" to use as reference tools. Only law libraries with an extensive medicolegal collection will be likely to purchase the *Encyclopedia;* more will find the little *Dictionary* of greater usefulness, as a supplement to the medical dictionaries. Because of the specialized material covered and the "professionalized" approach of the books, I suggest that they be ordered "on approval", or otherwise examined, before purchase.

DILLARD S. GARDNER
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THE MEDICAL ASPECTS OF NEGLIGENCE CASES. *By Charles Kramer. New York: The Practising Law Institute. 1953. $2.00.*

In preparing and trying personal injuries cases, counsel's most difficult problems usually are in dealing with the medical aspects. The amount recovered by a plaintiff often depends upon the effectiveness of the presentation of the facts about the injuries. Defendant's counsel must be alert to expose the weaknesses in the medical side of the claimant's case.

A new monograph on *The Medical Aspects of Negligence Cases* has been published by the Practising Law Institute. Written by Charles Kramer, an active trial lawyer in New York, it explains the tactics and

techniques of expert trial lawyers, beginning with the preparation of the case. The author discusses such questions as whether plaintiff's counsel should permit the physical examination of his client while he is still in the hospital; why plaintiff's attorney should seek to have the examination conducted at his and not at the examining doctor's office; what preparation the plaintiff's attorney should make for the examination, and what he should do during it.

The monograph deals at length with the injury paragraph of the bill of particulars and explains why specific medical terms should be used, how to present the injuries favorably and how to include their effects as well as a mere description of the injuries. It also discusses whether to allege that the ailment, or the secondary condition, if there is one, was caused, aggravated or precipitated by the accident. In addition, Mr. Kramer explains the several procedures available where a new condition develops after serving the bill of particulars, or if a particular injury has been overlooked, so that proof of such injury may be admitted at the trial.

Helpful suggestions are also made on the utilization of the hospital records by defendant's as well as plaintiff's attorneys.

The major portion of the monograph is devoted to the trial itself. The author discusses the references to the injuries to be made in the opening statement, and the use of both medical terms and lay language.

On direct examination the plaintiff should describe the nature, intensity and frequency of his pain and should relate his difficulty to the malfunctioning of the organ. If both the attending doctor and an expert are to testify, the plaintiff usually should call the attending physician first. But there are circumstances when the consultant should precede the family doctor, or when the latter should not be called by the plaintiff. The direct examination of the plaintiff's doctor should cover his qualifications, the history of the accident which he obtained when he first saw the plaintiff, the doctor's findings, the treatment given, the plaintiff's complaints of pain during the course thereof, the diagnosis and permanency or prognosis of the injuries, the hypothetical question, and the value of his services. Often, defendant's counsel is faced with the dilemma of whether it will do more harm than good to have his examining doctor testify; and his direct examination d.ffers somewhat in technique. The author makes numerous suggestions on the cross-examination of doctors.

The author stresses that to obtain a satisfactory verdict, plaintiff's summation must discuss the injuries and damages adequately. Detailed suggestions are made on how this may be done effectively.

The new publication is one of a series of twenty-nine monographs on trial practice, which also includes two companion monographs on *Preparation of Negligence Cases,* by A. Harold Frost, and *The Trial of a Negligence Action,* by Harry A. Gair.

## Names That Will Live

■ The buildings of the American Bar Center, now under construction upon Chicago's Midway, offer a great opportunity for commemorating the names of contributors to the advancement of our society and the legal profession.

The families, the firms and the friends of the men who have honored the legal profession may make their commemorative contributions in terms of named rooms and distinguished features of the Bar Center buildings.

Such a contribution amounts to a gift, in the name of the man admired, to a cause for which he was a chief proponent. At the time, it permits his admirers to pass on to generations to come knowledge of his qualities. Such is the evidence of greatness.

There are many parts of the buildings that offer suitable commemorative opportunities. Joseph W. Henderson, of Philadelphia, Past President of the American Bar Association, is Chairman of a committee that is considering opportunities for these gifts. Several already have been made and negotiations are under way for others.

Mr. Henderson has pointed out that in addition to these gifts for specific parts of the buildings, there also will be opportunities for commemorative endowment gifts to ensure the financing of research and other projects to be undertaken in the Center. These are now being developed in co-operation with Harold J. Gallagher, another Past President of the Association.

The opportunities for commemoration within the buildings range from panels in the entrance lobbies to the Board of Governor's Room and the Members' Lounge. They include the office of the President, the library and many offices in which work directly related to the interests of the men to be commemorated will be carried on.

Those interested in further details of the opportunities for such gifts are invited to address Joseph W. Henderson, 1910 Packard Building, Philadelphia 2, Pennsylvania.

# Courts, Departments and Agencies

**George Rossman** • EDITOR-IN-CHARGE **Richard B. Allen** • ASSISTANT

**Admiralty Law . . . liability of Coast Guard in rescue operation.**

■ Over a strong dissent by Chief Judge Biggs, the Court of Appeals for the Third Circuit, sitting *en banc*, has held that the United States is not liable for fault of the Coast Guard in conducting a rescue operation at sea. In a first impression decision, the Court said that public policy dictates the result.

The Court declared that the morale and effectiveness of the Coast Guard would suffer "if the conduct of its officers and personnel . . . in rescue operations . . . is to be scrutinized, weighed in the delicate balance and adjudicated by Monday-morning judicial quarterbacks. . . ." Moreover, the Court stated, since promotion in the Coast Guard is based on "merits and demerits", the instinct of self-preservation and the reluctance to do anything that might later prove wrong and injurious to a career would hamper the Guard's rescue potential. The Court pointed out that the Public Vessels Act [46 U.S.C.A. §§ 781 *et seq.*] imposes liability on the United States only for damages caused by the negligent operation of its public vessels, and does not encompass rescue operations of the Coast Guard.

In his dissent, Chief Judge Biggs termed the holding in regard to the Coast Guard's nonliability "purest *dicta*", since the majority also had held that the negligence attributable to the Coast Guard vessel was "simple negligence" and was merely the "condition" and not the "cause" of the damages, whereas a salvor to be liable must be guilty of "gross negligence" or "wilful misconduct". But he expressed his opinion nevertheless that the Coast Guard is liable like any ordinary salvor. He felt that this question was foreclosed by reading together the Public Vessels Act, the Suits in Admiralty Act [46 U.S. C.A. §§ 741 *et seq.*] and *Canadian Aviator, Ltd.* v. *U.S.*, 324 U.S. 215, where the Supreme Court construed the former Act as imposing the same liability on the United States as on a private shipowner. There would be no room, in his opinion, to read in an exception for rescue operations.

Judges Goodrich and Staley also dissented.

(*The P. Dougherty Company* v. *U.S.*, C.A. 3d, September 9, 1953, Kalodner, J.)

**Conflict of Laws . . . what law controls validity of marriage.**

■ In a case arising from conflicting petitions for letters of administration, the New York Court of Appeals has ruled that a marriage between an uncle and his half-niece, performed in Rhode Island in accordance with that state's law, is valid in New York, and that the widower is therefore entitled to priority in issuance of letters.

The parties to the disputed wedlock, both Jewish, were residents of New York, which, along with Rhode Island, prohibits uncle-niece marriages as incestuous. In Rhode Island, however, there was in force at the time of the marriage a statute providing an exception to the rule where the marriage was between persons of the Jewish faith within the degrees of affinity and consanguinity allowed by their religion. The marriage was concededly legal in Rhode Island. Shortly after the marriage the parties returned to New York and lived there thirty-two years until the wife's death.

The Court regarded as settled law that the legality of a marriage is to be determined by the law of the place where it is celebrated, subject to two exceptions: (1) cases within the prohibition of positive law, and (2) cases involving polygamy or incest in a degree regarded generally as within the prohibition of natural law. As to the first exception, the Court declined to give the New York statute proscribing the marriage involved extraterritorial effect in the absence of specific legislative enactment to that effect. As to the second exception, the Court held that since such marriages were permissible among Jews, they could not be so odious as to fall within the prohibitions of natural law.

One justice dissented on the ground that the marriage should be considered void in New York since it was contrary to positive law of that state, which must also be considered expressive of the jurisdiction's public policy and natural law.

(*In re May's Estate*, NYCA., July 14, 1953, Lewis, C.J., 114 N.E. 2d 4.)

**Constitutional Law . . . censorship.**

■ In 1952, the Supreme Court overruled a position it had taken twenty-seven years before and ruled that motion picures are entitled to freedom-of-speech protection under the First and Fourteenth Amendments the same as other forms of communication. *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495. But the Court of Appeals of New York has decided that the effect of the *Burstyn* case is not to deprive a state of its licensing and prior-censorship powers over films if the statute under which the powers are exercised sets forth an adequate standard.

The motion picture involved was the French film, *La Ronde*, which depicts a series of ten "illicit amorous adventures" (to use the Court's lan-

*Editor's Note:* Virtually all the material mentioned in the above digests appears in the publications of the West Publishing Company or in The United States Law Week.

guage) in which one participant in each episode appears in the one following until in the last scene one of the persons in the first reappears. In New York a motion picture must be licensed for public exhibition by the State Board of Regents, under a statute which provides that no film shall be approved if it is "obscene, indecent, immoral, inhuman, sacrilegious, or is of such a character that its exhibition would tend to corrupt morals or incite to crime". In the case of *La Ronde* the Regents based their refusal to license on a finding that the picture was "immoral" and "would tend to corrupt morals" within the statutory meaning.

In a four-to-two decision the Court upheld the statute against an attack that it was unconstitutional for allowing previous restraint on freedom of expression and for failing to provide an adequate standard to satisfy due process. The Court declared that the *Burstyn* case did not reach the issue of prior restraint and quoted the Supreme Court in that case as saying it did not follow "that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places". The Court further found that the statutory language formulated an adequate standard and that it was clear that the word "immoral" as employed in the statute related to sexual immorality. The Court also found that the Board of Regents had been correct in its determination that the film collided with the statutory requirements.

Two judges dissented on the ground that the case involved an unconstitutional application of prior restraint and that the statutory standards of "immoral" and "tending to corrupt morals" were not adequate from a due process viewpoint.

(*Commercial Pictures Corp.* v. *Board of Regents*, N.Y. C.A., May 28, 1953, Froessel, J., 113 N.E. 2d 502.)

**Criminal Law . . . waiver of unanimous jury verdict.**

▪ May a criminal defendant in a federal court waive his right to a unanimous verdict of the jury? In a first impression case, the Court of Appeals for the Sixth Circuit has held that he cannot do so under any circumstances and that a verdict reached by less than unanimity is a nullity.

After the jury had deliberated a half-hour they reported to the court that they were unable to agree. The trial judge then inquired whether a majority verdict would be acceptable. The defendant, after consultation with his counsel, so agreed, as did the United States Attorney. The jury then found the defendant guilty on both counts of the indictment—by nine-to-three and ten-to-two votes.

Rule 31 (a) of the Federal Rules of Criminal Procedure provides that a verdict shall be unanimous. The Government argued, however, that this, like the right to a trial by jury and the right to a twelve-man jury, could be waived by an express, clear and intelligent waiver. The Court ruled that there was a distinction between waiving a jury and waiving the requirement of a unanimous verdict. The latter waiver, it said, "is inextricably interwoven with the required measure of proof". It would be a contradiction of terms, the Court continued, to say that guilt must be proved beyond a reasonable doubt, if, in fact, one or more of the jurors remained reasonably in doubt. Moreover, the Court indicated that in the present case, since the suggestion for a less-than-unanimous verdict came from the trial judge, the waiver of the defendant might not have been entirely free and unfettered.

(*Hibdon* v. *U.S.*, C.A. 6th, June 2, 1953, Simons, C.J., 204 F. 2d 834.)

**Dead Bodies . . . disinterment.**

▪ Although the Supreme Court of New Mexico says it doesn't share the superstition that some disturbers of the tomb of Tutankhamen suffered fatal accidents because "an evil fate awaited those who dared disturb the sleep of the dead", it has denied a widow her application to disinter and change the burial place of her deceased husband.

The widow had originally consented to the burial place and had reserved a spot for herself. Her husband in his lifetime had also expressed a desire to be buried where he was. Later the widow changed her mind. But, the Court said, disinterment should not be permitted unless compelling reasons are shown, and it declared that none were evident in this case. So, as to the deceased husband's body, the Court ordered: "Let it sleep on, wholly oblivious to the turmoil that rages above it."

(*Theodore* v. *Theodore*, Sup. Ct. N.M., July 29, 1953, Sadler, C.J., 259 P. 2d 795.)

**Evidence . . . testimony as to previous identification.**

▪ At common law, the rule was that a witness' identification of an accused person during trial could not be bolstered by evidence indicating that the witness had previously made the same identification. New York by statute has provided, however, that "a witness who has on a previous occasion identified such person may testify to such previous identification".

Faced with a construction of the statute, the Court of Appeals for New York has held that it does not permit one who merely was present at the witness' previous identification to testify as to that identification for the purpose of corroboration. Consequently, the Court held, where such testimony was permitted, the conviction should be reversed.

Since the statute is in derogation of the common law, the Court declared, it must be strictly construed. And since, the Court continued, the statute limited itself to allowing only the person who had made the previous identification to testify later regarding it, the Court should not extend the exception to those who merely were present and heard or saw the previous identification.

Two judges dissented on the ground that, while the testimony was erroneously admitted, the con-

viction should stand since there was other compelling evidence.

(*People* v. *Trowbridge*, N.Y. C.A., July 14, 1953, Conway, J., 113 N.E. 2d 841.)

**Husband and Wife . . . support and maintenance.**

■ The Supreme Court of Nebraska has held that a wife, while residing with her husband and maintaining a home with him, cannot maintain an equitable action for an allowance of support and maintenance money. For such an action to lie, the Court ruled, the parties must be living separate and apart.

The Court admitted that the conduct of the defendant left "little to be said in his behalf", and the trial court, apparently in agreement with that sentiment, had entered a decree granting the wife relief and a monthly allowance. But, the Court declared: "As long as the home is maintained and the parties are living as husband and wife it may be said that the husband is legally supporting his wife and the purpose of the marriage relation is being carried out. Public policy requires such a holding."

There was no question of the bare necessities of life, such as food, being furnished, and so possible quasi-criminal action for nonsupport was not involved.

(*McGuire* v. *McGuire*, Sup. Ct. Neb., June 26, 1953, Messmore, J., 59 N.W. 2d 336.)

**Indictments and Informations . . . conspiracy.**

■ An Illinois criminal defendant was indicted under that state's conspiracy statute for conspiring to do an "illegal act injurious to the public trade, health, morals . . . "—which is one of the statutory grounds of conspiracy. The basis of the charge was that he had in his possession and sold unlabeled horse meat. Another Illinois statute makes possession of unlabeled horse meat "ready for distribution" a misdemeanor, while conspiracy itself is a felony.

The Appellate Court of Illinois, Second District, sustained an order of the trial court quashing the indictment. The Court ruled that an indictment for conspiracy would not lie when it simply charged violation of another criminal statute, unless the illegal acts charged would "in their usual and ordinary tendencies" be injurious to the public trade, health or morals. Since the indictment did not charge that the horse meat was of bad quality or harmful in itself, the Court observed that it would not necessarily be injurious to the public health simply because it was not labeled, for the "mere stamping . . . would not make any difference in the quality of the meat. . . . "

(*People* v. *Balkan*, App. Ct. Ill., 2d Dist., July 9, 1953, Wolfe, J., 113 N.E. 2d 813.)

**Labor Law . . . use of injunction.**

■ The recent decision of the United States District Court for the District of Oregon in *Montgomery Ward & Co.* v. *Northern Pacific Terminal Co.*, — F.Supp. — (39 A.B.A.J. 917; October, 1953), that common carriers are liable in damages for failing to serve a strike-bound plant, has already been criticized. In refusing to grant an injunction seeking to restrain several unions and transport companies from preventing deliveries to and pick-ups from a strike-bound concern, the United States District Court for the Western District of Michigan says that it "is not in accord with the far-reaching decision . . . " in the Oregon case.

The Court in the *Montgomery Ward* case held that federal laws regulating labor relations and interstate commerce had not abrogated the common-law duty of common carriers to furnish service, even in the setting of a heated labor dispute. But the Court in the instant case declared that by legislative action Congress had pre-empted the field of labor relations in interstate commerce, except in certain instances not involved in this case, and that therefore any relief would have to be sought through the procedures provided by the Taft-Hartley Act.

The employer had originally obtained an injunction in a state court, but the District Court, holding that removal was proper, ruled that it had no power to grant an injunction and also vacated the state-court order.

(*Overton Co.* v. *International Brotherhood of Teamsters etc., et al.*, U.S. D.C. W.D. Mich., August 14, 1953, Starr, J.)

**Labor Law . . . when is company engaged in interstate commerce?**

■ Employees in the bookkeeping and maintenance departments of a local utility company are "engaged in commerce" within the meaning of that phrase as used in the Fair Labor Standards Act [29 U.S.C.A §201 *et seq.*] when the utility furnishes gas to a manufacturing company whose products admittedly move in interstate commerce, according to the United States District Court for the Western District of Pennsylvania.

In so ruling, the Court pointed to the broad language of the Act and said that it did not require that the employee be directly engaged in interstate commerce or even in the production of articles becoming the subject of such commerce. It was enough, the Court held, if the employee's work was "necessary to the production of a part of any other articles or subjects of commerce of any character which are produced for trade, commerce or transportation among the several states".

The Court also held that the Act's exemption of retail sales or service establishments was not applicable to utilities.

(*Durkin* v. *Mercer Water Co., et al.*, U.S. D.C. W.D. Pa., June 2, 1953, Gourley, C.J., 112 F. Supp. 656.)

**Military Law . . . failure to classify and safeguard military information.**

■ The court-martial conviction of Major General Robert W. Grow on charges of failing to classify and safeguard military information has been affirmed by the United States Court of Military Appeals.

The accused, a military attaché in Moscow, attended a top secret conference in Frankfurt, Germany, in

1951. While there he recorded the events of the conference in his diary and also noted the contents of a committee report which he made to the conference, which report itself was classified "secret". Persons unknown obtained entry to the general's quarters and photographed the diary, and in January of 1952 portions of it appeared in a German Communist publication entitled *Auf den Kriegspfad* [*On the Path to War*].

The Court held that General Grow was properly convicted of dereliction of duty in failing to classify the entries in his diary in accordance with the classification assigned to the documents from which the entries emanated, and rejected his contention that an officer's duty to classify military information does not apply to a personal diary not intended to be seen by others. The Court ruled that there was a further dereliction in not properly safeguarding the diary so that it could not fall into unauthorized hands. In this connection the accused had himself stated that he treated his diary as a letter from his Congressman or a copy of the *Saturday Evening Post*.

(*U.S.* v. *Grow*, U.S. Ct. Mil. App., July 17, 1953, Quinn, C.J., 3 U.S.C. M.A. 77.)

**Nuisances . . . window air-conditioning units.**

■ In a novel case of first impression, a New York court has held that the owner and user of a properly operating window air-conditioning unit which emitted a droning noise similar in character and intensity to that commonly made by all such units is not guilty, either civilly or criminally, of maintaining a nuisance, or of creating an "unreasonably loud, disturbing and unnecessary noise" under the Administrative Code of the City of New York.

In so deciding, the Magistrates' Court of the City of New York, Borough of Brooklyn, referred to the delicacy of balancing the right of one to use his own property as he sees fit against the right of society to be free from nuisances. Those living in urban communities, the Court observed, must put up with some annoyances and disturbances. The Court opined that the steady droning noise of the air-conditioner was less annoying than the racing of engines, the sounding of horns, the conversations of passers-by and the crying and playing of children in neighboring apartments. "A conviction in this case", it declared, "would not only ignore the way pointed out by firmly established principles in the law of nuisance, but would constitute a vain attempt to arrest scientific progress."

(*State* v. *Arkow*, Mag. Ct. N.Y., Brooklyn, July 30, 1953, Malbin, C.M.)

**Taxation . . . distribution of income in family partnership.**

■ Family partnerships continue to be a rather fruitful source of litigation in federal tax law. The Court of Appeals for the Second Circuit has held that since a family partnership may be found wholly invalid for tax purposes, it is a concomitant of that principle that it may be found partially invalid in that income to it was not distributed in reasonable accordance with the capital contributions of the partners and the services rendered by them.

The family partnership involved was admittedly valid under tax law as such, but the revenue agent on the case revised the income distribution and salaries, which the Government contended were out of focus with capital contributions and services. The taxpayer contended that since the partnership was conceded to be actual and bona fide, there was no power to alter the division of profits and salaries agreeable to the partners.

The Court ruled, however, that there was such power and approved an instruction of the trial judge that the burden of proof was on the taxpayer to prove that the profit distribution and salary pattern set up by the agent was "wrong upon any proper theory" and that the pattern contended for by the taxpayer "was a bona fide and reasonable one, taking into account all the facts and circumstances".

(*Weiss* v. *Johnson*, C.A. 2d, August 19, 1953, Clark, J.)

**Taxation . . . social security.**

■ A Texas couple have lost their fight in the Court of Appeals for the Fifth Circuit against the 1950 amendment to the Federal Insurance Contributions Act [26 U.S.C.A. §§1400-1432] which extended social security coverage to domestic servants and compelled employers to withhold the tax and remit it to the collector.

The original act exempted domestic service, and it was contended that the famous cases affirming that statute (*Steward Machine Co.* v. *Davis*, 301 U.S. 548, and *Helvering* v. *Davis*, 301 U.S. 619) were not controlling since they had determined only the narrow point that the tax was constitutional as applied to business, rather than domestic, employment. The basic contention was that domestic employment does not fall under the federal taxing power as defined in the Constitution in Article I, Section 8, and therefore may not be subjected to an excise tax, and that employers of domestic servants may not be burdened as uncompensated tax collectors.

The Court rejected all these contentions. It emphasized the breadth of the federal taxing power, and held that there would be no valid reason for contending that Congress had power to subject business employers to the tax, but not domestic employers. The Court also ruled that the amendment was not unconstitutionally arbitrary and discriminatory because it applied only to persons working a certain number of days in a calendar quarter and receiving more than a certain sum, and that it did not impose involuntary servitude on employers contrary to the Thirteenth Amendment.

(*Abney et vir* v. *Campbell, Jr.*, C.A. 5th, August 18, 1953, Hutcheson, J.)

**Trials . . . mention of noninsurance.**

■ The rule that a plaintiff in a tort action cannot inform the jury that

the defendant is insured is a shoe that fits both feet. The Supreme Court of Washington has held that where nothing has been done or said from which the jury might infer that the defendant is insured, it is improper for the defendant to show that he is not protected.

The defendant's counsel had told the jury in his preliminary statement that his client had no insurance. The trial court denied the plaintiff's motion for a mistrial and instructed the jury to disregard the statement.

The Court said that it could not agree with the contentions that there was no ground for believing the statement was not reflected in the verdict and that the statement was not prejudicial because it merely resulted in having the jury decide the case on the merits without regard to insurance. The jury may well have been influenced, the Court opined.

The case was one of first impression in Washington, but other jurisdictions have reached a similar conclusion.

(*King* v. *Starr*, Sup. Ct. Wash., August 21, 1953, Donworth, J. 260 P. 2d 351.)

**Wills . . . publication.**

■ The necessity that a will be published by the testator to the attesting witnesses has been emphasized in a recent decision of the Court of Appeals of New York. The testator had prepared a holographic will while in the safe-deposit vault of his bank, and he asked two vault guards to witness it. He did not tell them that it was his will and they later testified that they did not in fact know it was, although the would-be testator made equivocal statements to the effect "in case something should happen . . . . " There was no attestation clause, the guards simply signing to the right of the maker's signature.

The Court held the writing not entitled to probate on the ground that there had been no publication as required by the New York statute providing that a testator "declare the instrument . . . to be his last will and testament". While the Court said that it could assume the writing was intended as a will, the statute required more. To comply with the statutory provision, the Court ruled, the testator must have knowledge of the testamentary nature of the writing and he must communicate or impress that knowledge on the attesting witnesses. The Court conceded that in the case of a holographic will there is less strictness required in proof of execution formalities, but declared there still must be compliance with the statutory mandates.

(*In re Pulvermacher's Will*, N.Y. C.A., June 4, 1953, Fuld, J., 113 N.E. 2d 525.)

**Wills . . . when is a will a will.**

■ One of those odd and baffling holographic instruments purporting to be a will which occasionally pop up in appellate courts has come before the Court of Civil Appeals of Texas at Dallas. Here is the will:

> Terrell Tex Jan 12–1950
> this letter is Written With the idea that Some thing might happen to me. that I would be wiped out Suddenly if this Should Happen
> my business would be in awful shape no relatives, nobody to do a thing So, this is written to try to have my affairs would up in a reasonable way
> in case of my Sudden Death. Would like to have all my affairs, Cash all assets including any Bank Balance turned over to Parties named below With out any Bond or any Court action that can be avoided.
> they to wind up my affairs in any way they See fit.
> U. C. Boyles Refrigeration Supply Co
> Charlie Hill Superior Ice Co
> Should these Gentleman need a third man Would Suggest Walker. National Bank of Commerce
> Each of these Gentleman to Receive $500.00 for his Services I have tried to make my wishes plain. of Course these Crooked Lawyers Would want a Lot of Whereas and Wherefores included in this.
> not much in favor of the organized Charities they are too Cold blooded also not much in Favor of any person over 21–Benefitting by my Kick off unless there is good reason am inclined to play the children
> they are not Responsible for being here and Cant help themselves
> Terrell–Feb. 7–1950
> have Let this Letter get cold and Read it again–to See if it Seemed abut right
> dont See much wrong except no wheres an Wherefores–excuse me
> LON GRESHAM

Construing this instrument, the Court held: (1) that it was not a will sufficient to vest legal and beneficial title to the estate in Boyles and Hill; (2) that although it might be sufficient to name Boyles and Hill as executors, under the Texas (and minority) rule, a will naming executors only cannot be admitted to probate; and (3) that the would-be testator's kindly reference to children did not manifest a sufficient intention to establish a charitable trust with Boyles and Hill as trustees. The writing was therefore denied probate.

(*Boyles* v. *Gresham*, Ct. Civ. App. Tex. Dallas, June 26, 1953, rehearing denied July 24, 1953, Dixon, J., 260 S.W. 2d 144.)

# Proceedings of the Assembly:

# Diamond Jubilee Meeting, August 23-28

■ In this issue we publish detailed accounts of the proceedings of the Assembly and the House of Delegates at the 76th Annual Meeting in Boston, August 23-28. The account of the proceedings of the Assembly begins on this page; the account of the proceedings of the House of Delegates begins at page 1024.

The Assembly of the American Bar Association is composed of all members in good standing who register at an Annual Meeting. The 4316 members who met in Boston this year set an all-time record for attendance. The Assembly met for five sessions, including the Annual Dinner, held on the evening of August 27.

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■ The Assembly of the American Bar Association, composed of all members of the Association registered at the Annual Meeting, was called to order at 10:00 A.M. Monday, August 24, 1953, by President Robert G. Storey, of Texas. The meeting was held in the Ballroom of the Hotel Statler in Boston.

The Most Reverend Eric F. MacKenzie, Auxiliary Bishop of Boston pronounced the invocation, and His Excellency, Christian A. Herter, Governor of Massachusetts, delivered the Address of Welcome to which Albert E. Jenner, Jr., of Illinois, replied on behalf of the Association.

President Storey introduced the distinguished guests who were seated on the platform. They included the Right Honorable Lord Simonds, the Lord High Chancellor of Great Britain, Lady Simonds, Honorable André Taschereau, President of the Canadian Bar Association, Honorable Kotaro Tanaka, Chief Justice of Japan; Honorable E. Gordon Gowling, Q. C., of Canada; Honorable John T. Hackett, Q. C., of Canada; Chief Justice C. Campbell McLaurin, of the Supreme Court of Alberta; Major General Reginald C. Harmon, Judge Advocate General of the Air Force; Major General E. M. Brannon, Judge Advocate General of the Army, Rear Admiral Ira H. Nunn, Judge Advocate General of the Navy.

George Maurice Morris, of the District of Columbia, Chairman of the Finance Committee of the American Bar Foundation, reported to the members on the progress of the campaign to raise $1,500,000 for the American Bar Center.

President Storey then delivered the President's Annual Address, which was published in the JOURNAL in the September issue, beginning at page 787.

The Assembly recessed and Carl B. Rix, of Wisconsin, called to order the annual meeting of the American Bar Endowment. Members of the American Bar Association are automatically members of the Endowment.

Mr. Rix reported that the Board of Directors of the Endowment had voted to turn over a substantial part of its funds to the American Bar Foundation for use in the American Bar Center. On motion of Harold J. Gallagher, of New York, an amendment to the Endowment's Charter and By-Laws was adopted permitting use of the Endowment's funds for this purpose.

Howard L. Barkdull, of Ohio, and John W. Guider, of New Hampshire, were re-elected as members of the Board of Directors of the Endowment.

The meeting of the Assembly then reconvened, and nominations were made for five vacancies as Assembly Delegates to the House of Delegates. Five Assembly Delegates are elected annually for three-years terms. The following were nominated: Arthur J. Freund, of Missouri; James D. Fellers, of Oklahoma; Albert MacC. Barnes, of New York; David Nelson Sutton, of Virginia; Blakey Helm, of Kentucky; Reginald S. Hemingway, of Pennsylvania; Paul W. Lashly, of Missouri; John R. Snively, of Illinois; Julius Applebaum, of New York; Grace Lewis, of New Jersey; Louis Waldman, of New York; Sybil Holmes, of Massachusetts; and Walter Chandler, of Tennessee.

### SECOND SESSION

■ The second session of the Assembly was held in John Hancock Hall, with President Storey in the chair.

The Reverend Albert Buckner Coe, President of the Massachusetts Congregational Conference, delivered the invocation.

Major General E. M. Brannon, Judge Advocate General of the Army, speaking in behalf of the Armed Services, read the following letter of thanks from the Secretary of Defense:

> The American Bar Association, during the past ten years, has contributed generously and effectively in the establishment and the support of the legal assistance programs of the Armed Forces and in the mobilization of thousands of volunteer civilian lawyers to collaborate with the legal assistance officers of the Service.
>
> From their inception in 1943, and continuing through the present date, these programs have assisted millions of the service personnel and their families, with personal legal problems. This work has been of great benefit to the morale of servicemen everywhere. I take great pleasure on this tenth anniversary of the legal assistance program of the Armed Forces in commending the American Bar Association for these patriotic services to the nation, and in thanking the members of the legal profession for their participation in that work.
>
> It seems particularly fitting that this commendation on behalf of all branches of the Armed Forces and all of their members who have been the beneficiaries of this service should be made on the occasion of the 75th Anniversary of the American Bar Association.
>
> Sincerely,
> C. E. Wilson.

On behalf of the Association, President Storey presented certificates of service to the seventeen living past Presidents of the Association. Present to receive this token of the Association's appreciation were John W. Davis, 1922-1923; Clarence E. Martin, 1932-1933; Scott M. Loftin, 1935-1936; Arthur T. Vanderbilt, 1937-1938; Jacob M. Lashly, 1940-1941; George Maurice Morris, 1942-1943; Joseph W. Henderson, 1943-1944; Carl B. Rix, 1946-1947; Frank E. Holman, 1948-1949; Harold J. Gallagher, 1949-1950; Cody Fowler, 1950-1951; Howard L. Barkdull, 1951-1952.

John W. Davis, of New York, replied for the past Presidents. Remarking that he had known personally fifty-one of the seventy-six Presidents of the Association, Mr. Davis expressed his thanks for the certificate. He concluded:

> I am honored greatly to be the spokesman of my colleagues here, and I think in a sentence or two I can sum up the emotions which this occasion inspires in me. The first is a sense of gratification that they have been given severally in their elected years an opportunity to be of service to this organization, an opportunity which, to none of them, will ever be forgotten, and, secondly, that watching, as they have done, in and out of office, the growth and expansion of the American Bar Association, they have taken, and they take today, increasing pride in that growth and that expansion. They witness with joy our increasing influence in public as well as private affairs in this country, and they wish for the American Bar Association, now and henceforth,. that it may grow, survive and flourish.

The certificates read simply: "It is certified that ———— served with distinction and honor as President of the American Bar Association during the year —— to ——."

Five former Presidents were unable to be present. They were Gurney Newlin, 1928-1929; Henry Upson Sims, 1929-1930; Guy A. Thompson, 1931-1932; Charles A. Beardsley, 1939-1940; and Tappan Gregory, 1947-1948.

The members of the Association then heard the two addresses of the afternoon by the President of the Canadian Bar Association, André Taschereau, of Quebec, and John Foster Dulles, the Secretary of State.

### THIRD SESSION

■ President Robert G. Storey called the third session of the Assembly to order at 2:30 P. M. on Thursday, August 27, in John Hancock Hall in Boston.

Rabbi Joseph S. Shubow, President of the Rabbinical Association of Greater Boston, pronounced the invocation.

C. Richard Wharton, of North Carolina, read the following memorial to the late United States Senator Willis Smith, who served as President of the Association in 1945-1946:

> Willis Smith, sixty-ninth President of the American Bar Association, was stricken suddenly with a heart attack in Washington in the early morning hours of June 23, 1953, and the final summons came three days later, June 26.
>
> The last weeks of his life were typical of his tremendous energy and capacity. During the twenty days just previous to his illness, he made twenty-four public appearances which included, between his working days in the United States Senate, three evening trips to his home state. He was always a hard and devoted worker. Equipped with a fine mind, prepossessing in appearance, tall and vigorous, Willis Smith spent his life with almost extravagant zeal—as a distinguished lawyer in the service of his clients and his profession, as a good citizen in the service of education, his church, and his community, and as an able statesman in the service of his country.
>
> Willis Smith was born in Norfolk, Virginia, on December 19, 1887. His father died when he was only two years of age and his mother immediately came back to her home in Elizabeth City, North Carolina, and established a neighborhood private school. From his mother's school, Willis went to Trinity College, now Duke University. He received his degree in 1910, afterwards studied law at Duke University, and was admitted to the Bar in 1912. After serving in the Army in World War I, he moved to Raleigh, the state capital, to practice law.
>
> He was remarkably successful both as a trial lawyer and as a wise counsellor. He was an all-around lawyer. He had a large corporate practice and many wealthy clients, and yet in his last court case he appeared in behalf of a widowed mother suing a large corporation, and one of his finest successes was achieved representing a poor Raleigh Negro who had a just claim against a prominent political figure. He was in every sense a lawyer in the best tradition of our calling.
>
> But Willis Smith did not limit his extraordinary talents to the service of his clients. He gladly accepted any real opportunity to serve the bench and the bar of America. This he did by his manifold labors in both our State Bar and in the American Bar Association., He served as President of the Wake County Bar and as President of the North Carolina Bar Association. Early in his career he became interested in the work of the American

Bar Association, serving on many important committees and on the Board of Governors from 1941 to 1944. In 1945, he was honored by election to the presidency of the Association. While President, upon the invitation of the War Department, he went to Nuremburg to observe the trials of the Axis war criminals by the International Tribunal. For the fruitful work he did and the challenging example he gave, the bench and the bar owe Willis Smith a lasting debt of gratitude.

Willis Smith was a devoted member of the Methodist Church, a leader in civic affairs, and a powerful factor in the development of his Alma Mater, Duke University, which, during his time, became one of the great Southern centers of higher education. He served on its Board of Trustees for twenty-four years, and for the last eight years of his life he was Chairman of the Board. Dr. Hollis Edens, President of Duke University, has said of him:

"He generously gave careful, personal attention to the affairs of the University. His constant availability and wise counsel . . . and his remarkable understanding of the academic climate were contributions of significant and enduring value.

"Duke University has lost a true servant, a strong right arm and one of its most respected and outstanding alumni."

From young manhood until his death, Willis Smith was a leading statesman in the official service of his state and nation. He was three times elected to the North Carolina House of Representatives, and, because of his achievements as a legislator, he was elected Speaker of the House in 1931. In 1947, President Truman appointed him to serve on the Amnesty Board which passed upon 16,000 cases of persons convicted under the Selective Service Act. In 1950, he was elected to the U. S. Senate and became a member of the Judiciary Committee. His was a distinguished record on this important committee and several special subcommittees. In 1951, he was the U. S. delegate to the Interparliamentary Union meeting in Istanbul, Turkey, and was a member of the American delegation to the Union meeting in 1952. In less than one term he became one of the prominent men of the Senate, even as he stood on the threshold of still greater achievements.

Willis Smith's untimely death has cut short his splendid career while life still had much to give him. Yet the many honors he received were but the token reward of his stirring example and useful service. That these can no more continue is a loss to friends and associates, to the fine family that so mirrored his loving devotion, to the bench and the bar, and to his state and country in whose interest his efforts never flagged. All of these will miss him and cherish his memory for what he so fully was—a good friend, a great lawyer, and a great American.

Mrs. Lois G. Forer, of Pennsylvania, winner of the 1953 Ross Prize Essay Contest, gave a short summary of her essay on "Guarantees of Free Speech versus the Right of Fair Trial". The essay was published in the September issue of the JOURNAL (page 800).

Secretary of the Navy Robert B. Anderson, delivered a few words of greetings to the Association.

The address of the afternoon was delivered by Attorney General Herbert Brownell, Jr.

### Resolutions Committee Reports on Sixteen Proposals

The Committee on Resolutions, under the Chairmanship of Roy E. Willy, of South Dakota, presented its report. Sixteen resolutions had been offered for consideration by individual members of the Association. Several of them dealt with highly controversial subjects and aroused more than usual interest, as was indicated by the large attendance throughout most of the session.

Resolution No. 1 was offered by George B. Harris, of Ohio. It condemned unnecessary and undue delay in the trial of both civil and criminal actions and requested all bar associations to do all within their power to bring about justice without unnecessary delay.

On recommendation of the Resolutions Committee, the Assembly voted to refer the resolution to the Section of Judicial Administration.

The second resolution, submitted by Whitney North Seymour and Dudley B. Bonsal, of New York, was adopted without debate. It was as follows:

> RESOLVED, That the American Bar Association endorses the program of the International Commission of Jurists in exposing systematic injustice and denials of individual rights in countries lying behind the Iron Curtain and in bringing to lawyers in those countries who attempt to secure justice and to protect such rights the encouragement and understanding of the lawyers of the free world.

The third resolution was as follows:

> WHEREAS, The American Bar Association has heretofore authorized the creation of, and for many years there has existed a Special Committee on the Rights of the Mentally Ill, which was again continued at this session; and
>
> WHEREAS, This Special Committee has made no report to the House of Delegates for many years; and
>
> WHEREAS, The members of the American Bar Association are aware of the serious and pressing problems existing in many sections of the country, due to the inadequacies existing in their substantive and procedural law, whereby the personal and property rights of individuals suffering from mental illness, as well as persons under suspicion of being mentally ill, fail to receive and are not accorded the full protection to which they are entitled under a proper concept of due process of law; and
>
> WHEREAS, The protection and safeguarding of the personal and property rights of mentally ill persons and of persons suspected of being mentally ill is and should remain a function of the judiciary, and the American Bar Association as well as the state and local associations of the several states should ever be alert to resist the encroachment upon or usurpation of judicial functions or any part thereof by lay agencies;
>
> NOW, THEREFORE, BE IT RESOLVED, That the Special Committee on the Rights of the Mentally Ill be and it hereby is charged with the responsibility of reporting to the House of Delegates, not later than the 1954 Annual Meeting of the American Bar Association, on the result of its studies, together with its recommendations of legislation that will better safeguard the rights of mentally ill persons and of persons under suspicion of mental illness, as well as maintaining the jurisdiction and powers of the several state courts charged with the protection of such rights.

This resolution had been offered by Arthur J. Gross, of Massachusetts, and was redrafted by the Committee on Resolutions. Mr. Gross accepted the Committee's version and it was

adopted by the Assembly in that form.

The fourth resolution was offered by Howard S. Whiteside, of Massachusetts. It reads as follows:

> WHEREAS, Qualifications for membership in the Association are prescribed by Article 2 of the Constitution, and said qualifications are in no way concerned with the race or color of members or prospective members; be it
>
> RESOLVED, That the American Bar Association shall not hereafter inquire as to the race or color of applicants for membership.

Chairman Willy said that the present application form makes no reference to color although it does require information as to the race of the applicant. Speaking for the Committee, Mr. Willy moved that the resolution be rejected, on the ground that the subject matter had been considered at great length by the Assembly, the House of Delegates and the Board of Governors, and that the present system is working satisfactorily and without discrimination.

Mr. Whiteside moved the original resolution as a substitute for Mr. Willy's motion.

Secretary Stecher called attention to a provision in the By-Laws of the Association which provides that the form of the application blank shall be prescribed by the Board of Governors.

Mr. Whiteside said that the point of his resolution was not that there actually was discrimination in electing members of the Association, but that "as long as we inquire into the race of prospective members we create the suspicion and opportunity for discrimination and we give our organization a bad name in the eyes of the world".

A motion to table by Edward S. Blackstone, of New York, was defeated. A motion to refer to the Board of Governors, by Arnold C. Otto, of Wisconsin, was likewise defeated.

W. E. Stanley, of Kansas, rising to a point of order, declared that the resolution was out of order since the By-Laws provide that the subject matter is for the Board of Governors.

### Resolution Is Adopted as "Advisory" to Board

President Storey ruled that Mr. Stanley was correct and held that the resolution was an advisory recommendation to the Board. The Assembly then adopted the resolution with that understanding.

The fifth resolution, introduced by Louis E. Wyman, of New Hampshire, was as follows:

> RESOLVED, That the American Bar Association disapproves advertising by any insurance company or association of insurance companies by which, through pictures or words, any person may be led to believe that, as a juror, he would have a personal financial interest in any verdict he might be called on to render in an action brought to recover damages for personal injuries caused by automobile operation, or that in reaching a verdict in such cases juries are fixing rates, or that all legitimate and reasonable claims are always settled without a lawsuit.

Mr. Willy explained that the subject matter of the resolution had come to the attention of the Board of Governors which has appointed a Special Committee to study and make recommendations. He reported that the majority of the Resolutions Committee felt, therefore, that no further action was required. He called attention to a minority report of the Committee which declared that the resolution should be "approved in principle. . .and referred to the Special Committee for implementation".

Mr. Wyman, the author of the resolution, moved the substitution of the minority report for the recommendation of the Committee. He urged the view that "that kind of advertising is a contempt of our whole judicial process" and a disservice to the insurance companies themselves. He declared: "I don't believe that any juror should consider that in finding a verdict he should rely on any suspicion that the result is coming out of his own pocket in the last analysis. It seems to me that verdicts of jurors should be based upon the evidence." He urged that the resolution be adopted to express the sense of the Assembly and give the Special Committee something to start with.

James R. Morford, of Delaware, who had filed the minority report, said that no one on the Resolutions Committee had defended the advertising and that no one had thought that it was proper.

Mr. Wyman's motion to adopt the minority report of the Committee carried.

The sixth resolution had been proposed by Richard Wait, of Massachusetts, on his own behalf and on behalf of other members of the Association. It requested appointment of a committee to study congressional investigations. Mr. Willy said that the resolution was in no sense an expression of opinion adverse to congressional investigations.

Speaking for the Resolutions Committee, he moved that the proposal be referred to an appropriate committee to be designated by the President. His motion carried.

The seventh resolution was offered by Endicott Peabody, of Massachusetts, and others. It reads as follows:

> WHEREAS, The House of Delegates of the American Bar Association, in 1952, adopted a resolution recommending the amendment of the Constitution of the United States in respect to executive agreements; and
>
> WHEREAS, The Senate Judiciary Committee recently reported Senate Joint Resolution No. 1, otherwise known as the "Bricker Amendment", which would amend the Constitution to curtail the powers of the President and the Senate to make treaties and executive agreements; and
>
> WHEREAS, The entire membership should be informed and its opinion should be recorded on this subject, which would vitally affect the power of the United States to deal with other sovereign nations on all matters, including those concerning national security such as atomic and hydrogen weapon control; and
>
> WHEREAS, Action of the American Bar Association will have great influence with the Congress of the United States and with the people because of the constitutional law problems involved; be it therefore

RESOLVED: 1. That during the next six months a full discussion of the proposed amendments be conducted in the *American Bar Association Journal* for the information and education of the membership, and that interested sections, committees and persons be invited to submit articles on either side of the question.

2. That pursuant to Article VI, Section 11 of the Constitution, the House of Delegates poll the membership individually by referendum returnable before March 31, 1954, as to its views on (a) the recommendations of the House of Delegates; (b) Senate Joint Resolution No. 1, as revised; and (c) The Knowland Substitute Resolution-Senate Joint Resolution No. 1 Amendment in the nature of a substitute.

3. That a compilation of the yeas and nays of such referendum be transmitted to the membership and to the Congress as the position of the American Bar Association.

Mr. Willy said that many issues of the JOURNAL had carried articles on both sides of the Bricker Amendment in the past, and that more were scheduled for the future. He declared that the Resolutions Committee felt that it would be wholly impractical to conduct a referendum on the subject. Speaking for the Committee, he recommended that the resolution be not adopted.

### Resolution Stirs Up Debate on Bricker Amendment

Mr. Peabody, the author of the resolution, moved that the original resolution be adopted in place of the motion of Mr. Willy. He pointed out that the President, the Secretary of State and the Attorney General were all on record as opposing the Amendment, which has only recently come into national prominence. He argued that many lawyers had not been cognizant of the problem, particularly the younger members, and that they should be heard on a matter of such importance.

Stuart DeBard, of Massachusetts, a coauthor of the resolution, declared that the views of the entire Association should be obtained on such an important issue. He estimated the cost of a referendum at 10 to 20 cents a person.

Frank E. Holman, of Washington, declared that a great amount of publicity had been given to the subject in the JOURNAL. He said that the language of the amendment was still in a state of flux and that the present language is sure to be changed, so that a referendum on the present text would be meaningless.

Alfred J. Schweppe, of Washington, declared that a referendum at this time would be premature and that the expense would not be justified. "We would be voting on something which, in all probability, will not become definitive until there has finally been a conference between the Senate and the House, which settles the final text, and that is probably six or eight months away," he declared.

Mr. Blackstone, of New York, moved to amend the resolution so as to provide that no referendum be taken until the text of the Amendment is in definitive form. Mr. Peabody accepted the amendment.

Arthur E. Whittemore, of Massachusetts, moved a further amendment, to the effect that the JOURNAL continue to publish discussions of the subject.

Mr. Holman, speaking against the amended resolution, declared "I can imagine no more ridiculous action by this group of lawyers than to pass a motion at this time so ambiguous as to say that when this has reached a definitive form—and who is going to determine that, if you please?"

Edward H. Jones, of Iowa, then moved, " as a substitute for all motions presently before the House that the matter of a referendum be deferred until such time as the House of Delegates or the Board of Governors deems that a referendum should be taken.

Blakey Helm, of Kentucky, declared that he was in favor of the original resolution. He said that Congress was entitled to know what the members of the Association thought about the proposal, arguing that the prestige of the Association would not depend upon whether it reversed itself, but rather upon "whether it truly represents the American Lawyers who belong to it". "I believe that it is more to the credit of the American Bar Association that it gets itself right than it is to stick to what it has done before," Mr. Helm said.

W. W. Gibson, of Minnesota, said that a referendum would cost at least $50,000 and that the Association could not afford it.

The Assembly then voted on the Jones substitute, which was carried by a vote of 252 to 175.

At this point, President Storey turned the chair over to David F. Maxwell, of Pennsylvania, Chairman of the House of Delegates.

The eighth resolution was submitted by Bernard Greensfelder, of Missouri. It directed attention to the numerous alphabetical agencies operating under the U. N. and requested the Association, acting through state and local bar associations, to encourage a study of the various organizations by individual members of such associations.

Mr. Willy said that his committee thought the objectives desirable, but that the action requested called for activity by local and state associations and was therefore not appropriate. On his motion, the resolution was disapproved.

The ninth and tenth resolutions were introduced by John M. Mullen, of Massachusetts, and Joseph Harrison, of New Jersey, respectively. They sought to secure a reversal of the stand taken by the House of Delegates opposing inclusion of lawyers under the social security program. Chairman Willy pointed out that the House of Delegates had referred a resolution reaffirming the opposition to social security back to the Committee on Unemployment and Social Security earlier in the day, and he moved that these resolutions also be referred to that committee.

Mr. Mullen moved to amend Mr. Willy's motion by adding that it was the sense of the Assembly that favorable consideration be given to granting lawyers social security protection.

Allen L. Oliver, of Missouri, Chairman of the Committee on Unemployment and Social Security, speaking in opposition to Mr. Mullen's amendment, said that his Committee had been studying the problem for a number of years and that the whole question required actual information which the Committee was gathering, but that the time was not ripe to decide the question.

Raphael A. Comparone, of Massachusetts, replied that the question had already been studied for a number of years and that there were lawyers who needed social security protection. "I don't say that the Association should make it compulsory for the attorneys to belong to this system, but at least the provisions of the law ought to be made available to those who have that desire," he maintained.

Allan H. W. Higgins, of Massachusetts, said that in his experience most lawyers did not understand the provisions of social security and were not aware of its limitations.

The Assembly then voted against Mr. Mullen's amendment to Chairman Willy's motion.

Joseph Harrison, the author of Resolution No. 10, declared that when American lawyers have been polled, they have been overwhelmingly in favor of social security coverage, and he wanted a continuing study made. He urged support of the Resolutions Committee's recommendation, which he called "eminently fair and sound".

The Assembly voted to accept the Committee's recommendation.

Resolution No. 11 was offered by John B. Ebinger, of Klamath Falls, Oregon, and proposed a new method of amendment to the Constitution of the United States. On Mr. Willy's motion, this was referred to the Committee on Jurisprudence and Law Reform.

Resolution No. 12, introduced by Palmer Hutcheson, of Texas, condemned the Kinsey report on women and urged Congress to prohibit the publication, circulation or sale of such statistics. The resolution was ruled to be out of order.

Resolutions Nos. 13 and 14 were presented by Miss Dorothy Frooks, of New York, and proposed a study of the exploitation of Fifth Amendment protection by "an un-American group". Mr. Willy recommended that the resolutions be not approved, on the ground that adoption of the proposal would destroy the legal protection afforded by the Fifth Amendment. The Assembly voted to adopt the Committee's recommendation.

The fifteenth resolution was proposed by Allen Spivock, of California, and urged a change in the life tenure of United States District Judges. On Mr. Willy's motion, the resolution was unanimously rejected.

The last resolution was proposed by Miss Ada F. York, of Massachusetts. It urged the enactment of legislation prohibiting the entry into the United States of aliens guilty of war crimes and calling for appointment of a special committee to survey the admission of such aliens and their employment by any government agency. Mr. Willy said that the Committee was sympathetic both to the proponent and the matter set forth in her resolution, but recommended that it be not adopted in the absence of affirmative evidence of a need for action.

Miss York cited three cases where the Association had appointed commissions to make recommendations to Congress, and urged adoption of the resolution. She declared that certain aliens guilty of war crimes had been admitted to the United States despite statutory barriers.

On motion of Herman Stuetzer, of Massachusetts, the resolution was tabled.

The Assembly then voted to adopt the proposed changes in the By-Laws of the Association, which the House of Delegates had adopted on the previous day. (For the text of these By-Laws, see page 1030).

Frank W. Grinnell, of Massachusetts, Chairman of the Committee on Award of Merit of the Section of Bar Activities, presented awards of merit for outstanding bar association activities.

Mr. Grinnell announced that first place in the large states classification went to the Ohio State Bar Association, with The Florida Bar, the Iowa State Bar Association and the Minnesota State Bar Association winning honorable mention.

The Oregon State Bar won first place among smaller state associations, with Rhode Island receiving honorable merit.

The Chicago Bar Association was given first place among large local associations, with the New York County Lawyers Association and the Bar Association of Lehigh County, Pennsylvania, the Lorain County (Ohio) Bar Association and the Passaic County (New Jersey) Bar Association winning honorable mention.

The Garfield County (Oklahoma) Bar Association won first place among the smaller local associations.

Donald A. Finkbeiner, of Ohio speaking for the Committee on Traffic Courts, announced awards to cities for improvement of traffic court practices and procedures.

The awards were as follows:

Group I—Population over 1 million
No award.
Honorable mention—Chicago, Illinois
Group II—750,000-1 million
No award.
Group III—500,000-750,000
No award,.
Honorable mention—Buffalo, New York
Group IV—350,000-500,000
No award.
Honorable mention—Oakland, California
Group V—200,000-350,000
First Place—Toledo, Ohio
Second Place—tie
Dayton, Ohio
Oklahoma City, Oklahoma
Honorable mention—
Akron, Ohio
Rochester, New York
Group VI—100,000-200,000
First Place—Hartford, Connecticut
Honorable mention—
Chattanooga, Tennessee
Tacoma, Washington
Group VII—50,000-100,000
First Place—Kalamazoo, Michigan
Honorable mention—
Wichita Falls, Texas

Terre Haute, Indiana
Stockton, California
Group VIII—25,000-50,000
Honorable mention—
Appleton, Wisconsin
Provo, Utah
Nutley, New Jersey
Group IX—10,000-25,000
First Place—Corvallis, Oregon
Honorable mention—
Salisbury, Maryland.

Judge Jacob J. Quillin, of Oregon, speaking for the Committee on Improvement in Traffic Courts of the Section of Judicial Administration, reported on the fourth year of the contest among states for traffic court improvements. He announced that California and New Jersey received first place awards, while Arizona and Virginia were given honorable mention. Minnesota and New York were also given honorable mention, the former for its program, "Go to Traffic Court as a Visitor, Not as a Violator", and the latter for its adoption of a statewide uniform traffic ticket and complaint. The Committee also commended California, Connecticut, Illinois, Michigan, Minnesota, New Oregon for holding statewide judicial conferences for traffic court judges and prosecutors.

### ANNUAL DINNER

■ The fourth session of the Assembly was the traditional Annual Dinner, held this year in the Imperial Ballroom at the Statler Hotel in Boston. Tickets for the event were sold out long in advance, and members were turned away even from the overflow group in the Georgian Room. The Dinner began at 7:30, Thursday evening, August 27, with President Storey presiding.

The invocation was pronounced by Dr. Frederick M. Eliot, President of the American Unitarian Association.

Chairman of the House of Delegates, David F. Maxwell, presented the American Bar Association Medal to former President Frank E. Holman, of Washington (see page 976).

Chief Justice Vinson then introduced the Right Honorable Lord Simonds, the Lord High Chancellor of Great Britain, who delivered the Mexico, Montana, Oklahoma, and address of the evening. (The introduction by the Chief Justice and the Lord High Chancellor's address will be printed in a subsequent issue of the JOURNAL.)

At the conclusion of Lord Simonds' address, President Storey presented Honorary Memberships in the Association to the Lord Chancellor, to Chief Justice Tanaka, of Japan, and to André Taschereau, President of the Canadian Bar Association.

Mr. Storey then turned the gavel over to President Jameson, who spoke briefly of his plans for the coming year.

### FIFTH SESSION

■ The fifth session of the Assembly was very brief and convened in the Georgian Room immediately after the adjournment of the House of Delegates on Friday, August 28, at 10:45 A.M. President Storey presided.

New officers and new members of the Board of Governors were presented and the meeting adjourned.

But in the complex social order and crowded world of today something more is needed than the faith in intelligent effort and the inventive wit that sufficed a century and a half ago. Jurisprudence has ceased to be a body of abstract learning concerned only with formal legal precepts. None of the social sciences may pretend longer to be sufficient unto itself. No court, no judiciary committee, no commission chosen for some one investigation can do the work of preparation demanded for intelligent law-making in the society of today. Popular mistrust of lawyers and discontent with law and legal administration of justice are the least of our obstacles. Above all we must provide for adequate research from which we may expect no less than has been realized from research in medicine.

—Roscoe Pound, in an address delivered at the 47th Annual Meeting of the American Bar Association, Philadelphia, 1924. (49 *A.B.A.Rep.* 223)

# Department of Legislation

**Charles B. Nutting,** Editor-in-Charge

■ Changes in common law rules brought about by legislative enactment are often overlooked except where, as in the case of workmen's compensation, virtually an entire body of law is altered. Professor Foster, in the following article, points out significant statutory changes extending strict liability into numerous areas and reveals the philosophy underlying the legislative action.

## Statutory Strict Liability

by Henry H. Foster, Jr., Professor of Law, University of Nebraska

■ Both by common law and statute, recognition is given to the value of security in the case of ultra hazardous activities which create abnormal, one-sided risks, the uncommonness of the hazard and the magnitude of the danger being regarded as an adequate philosophical basis for tort liability.[1] In addition, present values have led to formulation of the question who should bear the loss. In answering that question courts and legislatures have discarded fault as the sole criterion and have been influenced by such economic factors as capacity to bear the loss, faculty to distribute the cost of injuries,[2] and ability to prevent accidents. The laws of agency and workmen's compensation are familiar examples where economic considerations have outweighed the fault element in the allocation of loss. Moreover, there has been such a dilution of the negligence formula in many cases that there are those who suspect that fault is no longer the real basis for recovery in personal injury cases.[3] Certain it is that a Procrustean application of the negligence formula may result in a liability which is stringent if not strict, as counsel for a utility or governmental defendant well know.

Statutory strict liability is of increasing importance in both tort and criminal law. The so-called "public welfare" offenses or "public torts", which impose legal responsibility despite the lack of *mens rea*, have multiplied not only in the area of traffic regulations but elsewhere as well.[4] Unquestionably, workmen's compensation acts have not only influenced other strict liability legislation but also have affected agency law in general.[5] There are innumerable instances where specific duties are imposed by statute and a nonnegligent or unintentional breach may entail tort liability.

The phrase statutory strict liability refers to tort rather than criminal statutes or ordinances. A distinction, often ignored, should be made between statutes which impose an affirmative duty and sometimes specifically provide a tort remedy, and those which prescribe a criminal sanction.[6] The first type of statute or ordinance usually is intended to affect civil actions directly and to impose a duty. The criminal statute only incidentally raises a duty, and it is the court itself which incorporates the legislative act into the standard of care which would be observed by the law-abiding reasonable man.[7] The latter type gives rise to the problem of negligence *per se*, the former should not. This distinction may have practical significance in determining whether a reasonable violation will be excused and in deciding whether or not the defenses of contributory negligence or assumption of risk apply.

Since the upholding of the constitutionality of workmen's compensation acts, it is generally accepted that there is legislative power to enact either tort or criminal strict liability statutes. Workmen's compensation acts usually eradicate fault as an element for compensation and eliminate the common law defenses. Child labor acts and safety appliances acts have also been construed to eliminate the usual common law defenses, although factory acts sometimes have been interpreted so as to leave them intact.

By common law and statute, strict liability may be imposed where the defendant is engaged in an ultrahazardous activity. The herpetologist who accidentally lets his king cobra escape and bite the plaintiff is liable. The owner of a scrub bull who is unsuccessful in deterring the amatory adventures of his charge is liable for any resulting misalliance. The proprietor of an arsenal is liable for a nonnegligent explosion. At an early stage of the common law there was strict liability for the spread of fire and for the use of firearms. All these things involve extreme danger. In addition there is another element common to all of them. That additional common element is that they

1. *Restatement of Torts*, §520. Dean Pound suggests ". . . must we not recognize also a third postulate, namely, that men must be able to assume that others, who keep things or maintain conditions or employ agencies that are likely to get out of hand or escape and do damage, will restrain them or keep them within proper bounds. . . . There is danger to the general security not only in what men do and the way in which they do it, but also in what they fail to do in not restraining things they maintain or agencies they employ which may do injury if not kept strictly in hand. . . . Looked at in this way, the ultimate basis of delictual liability is the social interest in the general security. This interest is threatened or infringed in three ways: (1) Intentional aggression, (2) negligent action, (3) failure to restrain potentially dangerous agencies which one employs. Accordingly these three are the immediate basis of delictual liability. . . ." Pound, *An Introduction to the Philosophy of Law* 175-177 (1922).

2. See Freezer, "Capacity To Bear Loss as a Factor in the Decision of Certain Types of Tort Cases", *79 U. of Pa. L. Rev.* 742 (1931) Green, *Judge and Jury* 99 (1930); and Foster and Keeton, "Liability Without Fault", 3 *Okla. L. Rev.* 1, 172, 206-214 (1950).

3. See Ehrenzweig, *Negligence Without Fault* (1951). For a comparative law study see Malone, "Damage Suits and Workmen's Compensation"; *9 NACCA L. J.* 20, *10 NACCA L. J.* 44 (1952). See also McNiece, "Is the Law of Negligence Obsolete?", *26 St. Johns L. Rev.* 255 (1952), reviewed in *39 A. B. A. J.* 64 (January, 1953).

4. Hall, *General Principles of Criminal Law* C. 10 (1947).

5. See Small, "The Effect of Workmen's Compensation Trends on Agency-Tort Concepts of Scope of Employment", *11 NACCA L. J.* 19 (1953).

6. See Note, 31 *Neb. L. Rev.* 474 (1952).

7. See Morris, "The Relation of Criminal Statutes to Tort Liability", *46 Harv. L. Rev.* 453 (1933).

are all uncommon. That is, the defendant created an abnormal one-sided risk, and there is, in the language of Lord Cairns, a "non-natural user",[8] or what the Restatement describes as an activity not in "common usage".[9] Where strict liability is imposed because the defendant created a dire risk of harm and experience shows that despite precautions things are apt to go amiss, in addition the hazard must be abnormal and the risks not mutual. For example, when the use of fire and firearms became prevalent, negligence became the basis for delictual responsibility, although the standard of care imposed was very great. By statute and decision a distinction is often made between cattle country and farm areas, the common law strict liability of the owner of trespassing cattle being modified in a cattle-raising community where the risk of trespass is mutual.

In the case of aircraft, by decision and statute strict liability is imposed for ground damage but negligence is a prerequisite for liability where there is a collision with another aircraft.[10] As to persons and property on the ground, for the most part, the risks are one-sided, while as between aircraft the risks are mutual. Moreover, it may be predicted that when aircraft become as common as automobiles, *i.e.*, in common usage, the basis of tort liability will probably shift to negligence.

A subordinate factor in such situations is the element of control. But it is not control in and of itself which places the situation in the category of strict liability instead of negligence. It is the fact that the thing which was subject to the defendant's control was highly dangerous, apt to do serious harm and was something not in common usage.

The jurisprudential basis for usual tort liability is the unreasonableness of the defendant's immediate conduct in creating an undue risk of harm. In the case of ultrahazardous activities, the immediate conduct may be perfectly reasonable, but the defendant has created an antecedent risk. For his own purposes, however laudable they may be, he has created a hazard and threatened the security of his neighbors. The common law may therefore effect a compromise. Even though the activity may be highly dangerous and unusual, the defendant may not be enjoined by equity but he in effect is permitted to continue upon the condition that he should accept responsibility if things go amiss.[11]

Where economic considerations rather than the ultrahazardous character of the enterprise have led to strict liability, such a consequence customarily has been rationalized either in terms of control or by the intuition that the defendant ought to take the bitter with the better and chalk the loss up to the cost of doing business. Although to some this is sophistry and the size of the defendant's pocketbook is the real basis of liability, capacity to bear or pass along the loss has become a paramount consideration in the law of agency and torts. Regardless of whether the "insurance" theory is or is not an alias for a "soak-the-rich" policy, it is firmly entrenched in decisions and statute. Vicarious liability and *respondeat superior* have grown apace and the distinction between "frolic" and "detour" has been narrowed while "scope of the employment" has been expanded.[12] Control or the right to control, in part due to the impact of workmen's compensation cases, is in many instances no longer the sole criterion and may be but a factor to be considered along with economic policies.[13] For years railroads have been singled out for special duties, and statutes often require them to fence rights of way, prevent the escape of sparks, or to be insurers of the safety of passengers or shipments.[14] It would be naïve to believe that economic considerations were not the impelling reasons for such legislation.

In addition, whether the basis for strict liability be the ultrahazardous character of the defendant's activity or capacity to bear the loss, a prophylactic element frequently enters into the determination of liability. In the case of dangerous things or where the object regulated has or is believed to have adequate resources, strict liability may be imposed for the purpose of inducing utmost care and preventive measures. For example, a recent statute takes away the proverbial first bite—*scienter* is dispensed with where the defendant's dog bites a plaintiff lawfully on the premises.[15] Another recent statute puts parents in the same category, for they are strictly accountable for the vandalism of their Dead-End-kid offspring.[16] Both statutes, of course, were passed in response to organized pressures, but each was supported by the argument that strict liability would accomplish greater control over the mischievous propensities of dogs and children. Regulations imposed on landlords or owners of tenements have a similar purpose of inducing preventive action.

In addition to statutory strict liability, constitutional provisions may be interpreted to impose liability without fault. In 1870, Illinois amended its constitution to provide that the owner of private property taken *or damaged* for public use was entitled to just compensation.[17] Over twenty states have copied this amendment, and tort as distinguished from condemnation actions may be brought for special damages sustained by the plaintiff due to a public improvement. Although there is marked disagreement in the cases, some courts have interpreted such eminent domain provisions as dis-

8. *Rylands* v. *Fletcher*, L. R. 3 H. L. 330 (1868).
9. *Restatement of Torts*, §520.
10. *Rochester Gas and Electric Co.* v. *Dunlop*, 148 Misc. 849, 266 N. Y. S. 469 (1933); 11 Uniform Laws Ann. 161-162 (1938) being §5 of the Uniform Aeronautics Act.
11. See McClintock, "Discretion To Deny Injunction Against Trespass and Nuisance", 12 *Minn. L. Rev.* 565 (1928); *Prosser, on Torts* §56 (1941).
12. See Small, "The Effect of Workmen's Compensation Trends on Agency-Torts Concepts of Scope of Employment", 11 *NACCA L. J.* 19 (1953).
13. See Stevens, "The Test of the Employment Relation", 38 *Mich. L. Rev.* 188 (1939). For an excellent discussion of the policy considerations underlying *respondeat superior*, see Seavey, *Studies in Agency* 129, 145-159 (1949).
14. For a discussion of such strict liability statutes see Note, 31 *Neb. L. Rev.* 474 (1952).
15. See Neb. Rev. Stat. §54-601 (Cum. Supp. 1949).
16. Neb. Laws c. 126, page 545 (1951).
17. Illinois Constitution Art. II, §13.

pensing with the necessity of proving negligence, on the ground that the plaintiff should not incur a special loss without compensation regardless of the nature of the defendant's conduct.[18]

Treaties also may impose strict liability. For example, under the terms of the Warsaw Convention,[19] subject to a maximum liability of 125,000 francs, carriers are made strictly liable for damage to passengers and baggage, and negligence is not an essential for recovery, although contributory negligence may be a valid defense.

Strict liability is firmly entrenched in our law. Although an occasional *brutum fulmen* is hurled against *Rylands* v. *Fletcher*,[20] the interesting thing is the way that wolf has succeeded when disguised in the sheepskin of nuisance.[21] Plaintiff's counsel may be perspicacious to argue nuisance rather than *Rylands* v. *Fletcher*, but if he prevails the result is the same. It should also be remembered that there is a corollary to *Rylands* v. *Fletcher*. If the ultra-hazardous character of the defendant's activity is to be a separate and acceptable basis for tort liability and a coequal factor with fault, it should follow as a matter of logic that in the absence of overriding economic considerations, there should be no liability for unintentional or nonnegligent conduct which is not ultrahazardous. The Restatement adopts the position that an accidental trespass or nuisance, where ultrahazardous activity is not involved, is not actionable.[22]

It should be noted that strict liability is not unlimited liability. Despite frequent judicial statements to the contrary, the defendant is not an "insurer".[23] Apart from statute, the common law usually restricts the category to instances of "nonnatural user", that is, where there is an abnormal onesided risk. In addition the plaintiff must prove causation and damages. At least some intervening causes will supersede.[24] A reckless assumption of risk will be a good defense.[25] Moreover, the risk theory of tort liability is more certain of application here than in the ordinary negligence case in that courts will delimit liability where the harm incurred was not within the hazard created or the plaintiff was not within the foreseeable zone of risk.[26]

It would appear that judicial Canutes who abhor strict liability should concentrate their fire on those instances of liability without fault which are historical accidents or hangovers from a more primitive order. If an ultrahazardous activity is not involved, and there are no impelling economic considerations for shifting the loss, negligence or intentional conduct should be a prerequisite for liability. In particular, according to present values, there should be no liability for an accidental trespass or nuisance which does not involve an ultrahazardous activity, and there should be a re-examination of the law pertaining to converters, defamers and the vicarious liability of joint tortfeasors. Strict liability has reached maturity as a distinct basis for delictual responsibility and its imposition should be limited to those instances where there is a social justification for its application.

18. See Foster, "Tort Liability Under Damage Clauses", *5 Okla. L. Rev.* 1 (1952).

19. 49 Stat. Pt. 2, page 3000, October 12, 1929, Treaty Series No. 876, Government Printing Office, 1934. See *Indemnity Ins. Co. of No. America* v. *Pan-American Airways*, (S. D., N. Y. 1944) 58 F. Supp. 338.

20. Exchequer Chamber, 1866, L. R. 1 Exch. 265; House of Lords, 1868 L. R. 3 H. L. 330.

21. See Foster and Keeton, "Liability Without Fault" 3 *Okla. L. Rev.* 1, 29-50 (1950).

22. *Restatement of Torts* §§166, 822.

23. See Note, "Absolute Liability for Dangerous Things", 61 Harv. L. Rev. 515 (1948).

24. *Box* v. *Jubb*, L. R. 4 Ex. Div. 76 (Ex. 1879), act of stranger held to relieve the defendant of liability. *Restatement, Torts* §522, however, imposes liability despite an intervening innocent, negligent or reckless act of a stranger but raises a *caveat* where the stranger's conduct is intentional or deliberate. It would seem that the majority of cases are not in accord with the Restatement and that most courts have applied a "proximate cause" approach to the problem. See *Prosser on Torts* 460-61 (1941).

25. See *Restatement of Torts* §524.

26. See Note, "Absolute Liability for Dangerous Things", *61 Harv. L. Rev.* 515 (1948). For an analysis of the so-called risk theory and a comparison of it with the usual proximate cause approach, see Comment, 32 *Neb. L. Rev.* 72 (1952).

# BAR ACTIVITIES

**Paul B. DeWitt • Editor-in-Charge**

Harry
GERSHENSON

■ Harry Gershenson, a former President of the St. Louis Bar Association, was elected Chairman of the Section of Bar Activities at the Annual Meeting in Boston. Mr. Gershenson served in the House of Delegates from 1948-1952 and is presently a member of the Board of Governors of the Missouri Bar Association. He succeeds Frank M. Sercombe as Chairman of the Section.

■ That nearly 10,000 cases a year involving boys and girls in trouble of one sort or another come before the Children's Court, and thousands of others become involved in other courts in New York City, was disclosed in a special study of laws relating to the family made by Professor Walter Gellhorn of Columbia Law School and released in July by The Association of the Bar of the City of New York's Special Committee on the Administration of Laws Relating to the Family, of which Allen T. Klots is Chairman. The study will be reviewed by that Committee and by the various courts and agencies involved and a final report will be submitted during the coming year.

The Gellhorn study was made possible by a grant for this purpose from Laurance S. Rockefeller to the Association of the Bar of the City of New York Fund, Inc., and is one of the most comprehensive that has been made on the subject of the jurisdiction of family problems. The report deals with such matters as claims for nonsupport, physical violence between husband and wife, maternity cases, neglected children, juvenile delinquency, annulments, divorce, separation, custody and adoption of children.

Professor Gellhorn points out that the courts which handle cases involving children are sadly lacking proper facilities. They are lacking an adequate number of trained investigators and clinical services to aid in diagnosing the difficulties before them. Another major recommendation of the Gellhorn study is the establishment of a unified Domestic Relations Court in New York City to handle all cases that reflect family breakdown. Professor Gellhorn concludes his study with the statement, "There is a choice before New York City. It may support generously the preventive and restorative work that should be but is now only partially done by such tribunals as the Children's Court and the Family Court. Or it may pay dearly at a later stage for institutionalization of disturbed persons, for criminalism, and for disrupted homes."

T. Justin
MOORE

■ The sixty-third annual meeting of the Virginia State Bar Association was held in White Sulphur Springs, West Virginia, in August with more than 650 members in attendance. Twenty standing and special committees reported. The total membership of the Association now exceeds nineteen hundred, and has more than doubled in the past twelve years. A panel discussion on the treaty-making power was sponsored by the Committee for Younger Members of the Bar, Edgar Bacon, Chairman. Three points of view were discussed. Major addresses were delivered by Justice Willis D. Miller, of the Court of Appeals of Virginia, and Chief Justice John E. Hickman, of the Supreme Court of Texas. T. Justin Moore was elected President, and William T. Muse was re-elected Secretary-Treasurer.

George E.
FRATER

■ George E. Frater was installed in June as President of the Columbus Bar Association. Also elected were Vice President Lloyd E. Bilger and Secretary and Treasurer Collis Gundy Lane. In his inaugural address, Mr. Frater commented on public relations as the obligation of each individual member of the Bar. He emphasized that while a bar association can speak for its constituent members, it is only action which creates good public relations and that is the responsibility of the individual.

■ The Ohio State Bar Association was successful in having enacted by the 100th General Assembly seven of the bills sponsored by the Association. The General Assembly enacted a total of 289 bills; 1,118 bills were introduced. Of the twelve measures sponsored by the Association, nine were passed by the legislature; but three of these were vetoed by the Governor, with the Assembly overriding one of the vetoes.

■ Minnesota lawyers attended in October the Fourth Annual Institute sponsored by the Minnesota State Bar Association. The two-day session, held in Minneapolis, covered the planning of estates for persons of average means. Edward L. Gruber, President of the Minnesota State Bar Association, in announcing the Institute, emphasized the great need for conserving the property and cash assets of persons of average means.

■ More than seventy-five Kansas newspapers have carried, or are carrying, the thirty "You and the Law" columns that have been prepared and released by The Bar Association of the State of Kansas. The columns reach an estimated 177,441 people throughout the state.

■ Everett L. Looney, of Austin, was inaugurated in July as President of the State Bar of Texas. This was the Texas Bar's Seventy-First Annual Meeting, and it drew eighteen hundred lawyers and six hundred guests from every part of the state. The meeting featured some twenty prominent Texans as well as a number of out-of-state speakers. Among the Texans who spoke were Secretary of the Navy Robert B. Anderson, former President Robert G. Storey, Senator Price Daniel and Governor Allan Shivers. Guests included Rafael Caraza of Mexico City, Official Delegate of the Barra Mexicana, and the President and Secretary of the Oklahoma Bar Association, Epton Hicks and Kenneth Harris. Entertainment included a production of *Trial by Jury* by the Fine Arts Department of North Texas State College. The names of the characters in the operetta were revised to include contemporary lawyers and jurists familiar to the audience.

■ The Public Relations Committee of the Florida Bar has published an Armed Forces pamphlet. Prepared by experienced lawyers, the pamphlet covers a number of subjects to which it is suggested that those entering the Armed Forces give careful consideration. Twenty thousand copies of the pamphlets have been printed, and fifteen thousand of these have already been delivered to the Armed Forces. All in Florida who enlist in any of the Armed Forces will receive a copy of the pamphlet.

## Activities of Sections

### SECTION OF BAR ACTIVITIES

■ The sessions of the Section held on Tuesday, August 25, were devoted to the subjects of interprofessional agreements between lawyers and doctors, and disciplinary procedures by bar associations. Both fields are of current concern, and many practical suggestions were developed.

The Council reviewed its request to the Board of Governors that the Canons of Professional Ethics be studied and revised, and reaffirmed its position that such work should be an early project of the American Bar Association.

Co-operation of the Section in publishing the *Coordinator* and making it available to as wide a list as possible was approved.

The Council established a special committee to plan a one-day program on Bar Association Organization and Operation for the Atlanta Mid-Year Meeting in March.

The committee consists of Ed Jones, Iowa, Charles W. Joiner, Michigan, and Philip S. Habermann, Wisconsin.

### SECTION OF ANTITRUST LAW

■ The new Antitrust Section held its First Anniversary meeting in Boston during the August Annual Meeting. The great interest of the members of the Association in the field covered by this Section is evidenced by its rapid growth to over 1,600 members. The Section meetings, luncheon, and joint dinner with the Section of Mineral Law had a capacity attendance.

The first meeting was devoted to a discussion of the Sherman Act. Papers by Professor Milton Handler, Herbert A. Bergson, David T. Searls and Edward R. Johnston were read. The second meeting, on the Clayton Act, was addressed by Commissioner Lowell B. Mason, Marcus Mattson, Professor M. A. Adelman and Breck P. McAllister.

The prestige already achieved by this Section is evidenced by the fact that Stanley N. Barnes, Assistant Attorney General in charge of the Antitrust Division, and Professor S. Chesterfield Oppenheim, Co-Chairmen of the Attorney General's National Committee To Study the Antitrust Laws, chose the Section's meetings as the occasion to announce the personnel and procedures of the Committee. Judge Barnes also made the principal speech at the luncheon.

David T. Searls, of Houston, Texas, was elected Chairman of the Section to succeed Edward R. Johnston of Chicago. William Simon, of Washington, D. C., was elected Vice Chairman. New members of the Council are Judge Stanley N. Barnes, E. Smythe Gambrell, of Atlanta, Georgia, and Albert R. Connelly, of New York, New York.

The spring meeting of the section, to be held in Washington in April, will be a symposium in which attorneys from the Department of Justice and the Federal Trade Commission will describe what they do at each stage of proceedings brought by their respective offices.

## Tax Notes

*(Continued from page 989)*

payments do discharge a "principal sum . . . specified" and hence are not taxable income to the wife and are not deductible from the husband's gross income. This is the reasoning: A principal sum can be computed by multiplying $200 per month by the number of months in the six-year period or 72 months. The result ($14,400) is a "principal sum . . . specified". The fact that the wife's remarriage or death before the end of the seventy-two months will stop the payments before the total amount of $14,400 has been paid is a condition subsequent that has no effect in making this principal sum unspecified.

The Tax Court applied this reasoning in the *Baker* case, but the United States Court of Appeals for the Second Circuit reversed on the ground that the principal sum was not "specified" and, therefore, payments discharging it remained "periodic payments" constituting income taxable to the wife and deductible from the husband's gross income. The contingency of the wife's remarriage at any time within the six-year period made impossible the computation at the time of the divorce of a principal sum by multiplying the monthly payments by the number of months during which they were to be made.

The Court, however, left open the question of whether the contingency of the wife's death alone is enough to make the principal sum unspecified. The possibility of death, beyond her control unlike remarriage, is subject to actuarial measurement. Also unanswered was the question of whether monthly payments to last only two or three years after the divorce, but subject to termination by her prior remarriage discharge a "principal sum . . . specified". This question will be especially difficult if the payments are large enough to settle the wife's marital property rights.

The words "principal sum . . . specified" alone are capable of the interpretation of either the Tax Court or the Court of Appeals. Their proper interpretation then is the one that best carries out the congressional purpose in enacting Sections 22 (k) and 23 (u). Congress did not intend to allow as a deduction from the husband's gross income and taxable to the wife payments in settlement of marital property rights in either one or a few years. Such amounts usually represent capital values. While the husband's obligation to make such a property settlement arises out of the "marital or family relationship" between the spouses, payments liquidating a "principal sum . . . which is, in terms of money or property, specified in the decree or instrument" incident thereto are not income to the wife unless they are to last over ten years. Even then, they are treated as her income yearly only up to 10 per cent of the principal sum specified. On the other hand, payments discharging the obligation to support are income to her and deductible from his gross income, whether they are to last over or under ten years.

The words "principal sum . . . specified" then describe a marital property settlement. The fact that payments discharging such a settlement over a period less than ten years are to cease on the wife's remarriage or death before the end of the period does not change the nature of the obligation being discharged. On the other hand, payments discharging an obligation of support may last under ten years and not be subject to prior termination on the happening of any contingencies like the wife's remarriage or death. The longer the payments are to last, however, the more their character becomes that of payments for support and not that of payments in discharge of a marital property settlement. The payments in the *Baker* case were small enough to be similar to support payments, especially since the husband had also made a lump-sum settlement in discharge of the wife's marital property rights.

The problem raised by the *Baker* case may be resolvable only by an amendment to Section 22 (k) which will shorten the statutory period from ten to four or five years, provide that a principal sum is "specified" in spite of the contingency of termination of payments by the wife's prior remarriage or death, and limit the amount taxable to her and deductible by the husband each year to 25 or 20 per cent, as the case may be, of the principal sum.

When determination of amounts to be paid for support and for settlement of marital property rights is dependent upon the tax incidence thereof, certainty of the rules concerning who is taxable thereon is essential.

Contributed by Charles B. Bayly, Jr.

**Fair Trial and Free Press**

*(Continued from page 981)*

which is quick to resent any form of censorship", and there is the unhappy consequence that publishers who either from temperament or the profit motive disregard the higher ethics of the newspaper profession and try to take advantage of others more sensitive.

As to the public, the Report comments:

> If the public had complete confidence in the fidelity and integrity of the processes by which justice is administered, intervention by agencies of publicity would plainly not be necessary to assure the purity of their operation. When doubt exists on this subject, intervention by publicity agencies is one of the safeguards upon which society must rely. It is quite impossible to lay down rules to determine either when and how far confidence in the judicial processes must be shaken before unusual intervention is justified, or the character and extent of the intervention when some action is conceded to be proper.

The Report goes on to say:

> '... We clearly could not live under a system which would send people to jail merely because they are unpopular or because their guilt has been assumed by persons who have not seen all the witnesses and heard both sides of the story. *It, therefore, becomes necessary for us to recognize as a limitation upon publicity the exclusion of anything that would tend to corrupt the judgment of the jury by introducing prejudice or substituting somebody else's uninformed judgment for the deliberate and supported judgment which they are expected to render.*

As to the judges, the comment is made that —

> The position of the judge in a criminal trial entitles him to a very high degree of consideration during the progress of the trial. In the nature of the case, he cannot indulge in newspaper controversy about his actions until after the trial is over. There is entire unanimity among the members of this joint committee in believing that judges, like any other public officers, must expect to have their conduct subjected to the freest criticism. Good judges welcome such criticism and slothful and incompetent judges should have it whether they welcome it or not.

The Report comments on the obvious danger of juries reading newspapers and hearing stories and seeing headlines in respect to cases which may influence them.

It is also pointed out that:

> ... The rule in Great Britain is that conduct outside of the courthouse likely to prejudice or obstruct the administration of justice will be punished as contempt.

But the Committee doubts very much whether any such rule could be applicable in the United States, however worthy its object.

Here, so far as lawyers are concerned, the Committee says:

> ... So far as these concessions are the result of the misconduct of lawyers, they seem to be wholly without justification and ought to be under the control and discipline both of the courts and of an organized bar. Your committee is unanimous in the belief that neither prosecuting attorneys nor counsel for the accused ought, during the course of the trial, to give newspaper interviews or make radio broadcasts either forecasting the effect of evidence yet to be produced or commenting upon evidence already introduced.
>
> So far as lawyers are concerned, the place to try their cases is in the courthouse and only the rarest combination of circumstances can justify their participation in any publicity prior to or during the trial. It can proceed from only one or the other of two motives. One is self-advertisement and the other an attempt to influence the trial by affecting that public opinion which constitutes the atmosphere in which the trial is to take place.

The Committee calls upon the local bar associations to strictly and resolutely enforce the obvious and known requirements of the code of professional ethics and believes that if this were done, "a very substantial part of the most glaring evils of improper publicity would be overcome", strikingly saying:

> A dignified statement, prepared by counsel for the accused, asking the public to suspend judgment upon the accused until the charges against him can be fully and fairly investigated, would seem to be the limit beyond which counsel ought not to go. The spectacle of counsel either for the state or the accused giving interviews to the newspapers as to their opinions, or making radio addresses during the trial of a case, is plainly in violation of the acknowledged ethics of the profession and in the opinion of this committee has a greater tendency to obstruct the fair administration of justice than any other kind of publicity now under examination.

The Committee report contains a number of recommendations upon which all parties were able to agree.

The House of Delegates of the American Bar Association approved the Committee's report to the extent that it had been concurred in by the three groups. (62 *A.B.A. Rep.* 243).

In 1938, after the death of Mr. Baker, the Committee reported to the House of Delegates of the American Bar Association through Mr. Merritt Lane of Newark, New Jersey. As signer, he made the following noteworthy statement:

> There are two foundation stones which can neither be removed nor chipped without danger to the system of government under which we live and to the freedom of the people—the freedom of the press and the freedom of the Bar. The freedom of the press cannot be maintained without the freedom of the Bar nor can the freedom of the Bar be maintained without the freedom of the press.
>
> The true and proper interests of the press and the Bar are in accord for they both serve the public and their existence is justified only by the service which they render. What would appear to be the selfish interests of either cannot be permitted to interfere with the interest of the public.

Although all of the interested Associations had received these reports and there had been discussions about the same and speeches had been made, no further progress seems to have been attained.

Attached to these notes are the old Canons of Journalism adopted by the American Society of Newspaper Editors in 1923. This does not seem ever to have been approved by the American Newspaper Publishers Association and there is no record that anything further was done about it.

### Canons of Journalism

The primary function of newspapers is to communicate to the human race what its members do, feel and think. Journalism, therefore, demands of its practitioners the widest range of intelligence, or knowledge, and of experience, as well as natural and trained powers of observation and reasoning. To its opportunities as a chronicle are indissolubly linked its obligations as teacher and interpreter.

To the end of finding some means of codifying sound practice and just aspirations of American journalism, these canons are set forth:

I.

Responsibility—The right of a newspaper to attract and hold readers is restricted by nothing but considerations of public welfare. The use that a newspaper makes of the share of public attention it gains serves to determine its sense of responsibility, which it shares with every member of its staff. A journalist who uses his power for any selfish or otherwise unworthy purpose is faithless to a high trust.

II.

Freedom of the Press—Freedom of the press is to be guarded as a vital right of mankind. It is the unquestionable right to discuss whatever is not explicitly forbidden by law, including the wisdom of any restrictive statute.

III.

Independence—Freedom from all obligations except that of fidelity to the public interest is vital.

1. Promotion of any private interest contrary to the general welfare, for whatever reason, is not compatible with honest journalism. So-called news communications from private sources should not be published without public notice of their source or else substantiation of their claims to value as news, both in form and substance.

2. Partisanship, in editorial comment which knowingly departs from the truth, does violence to the best spirit of American journalism; in the news columns it is subversive of a fundamental principle of the profession.

IV.

Sincerity, Truthfulness, Accuracy—Good faith with the reader is the foundation of all journalism worthy of the name.

1. By every consideration of good faith a newspaper is constrained to be truthful. It is not to be excused for lack of thoroughness or accuracy within its control, or failure to obtain command of these essential qualities.

2. Headlines should be fully warranted by the contents of the articles which they surmount.

V.

Impartiality—Sound practice makes clear distinction between news reports and expressions of opinion. News reports should be free from opinion or bias of any kind.

1. This rule does not apply to so-called special articles unmistakably devoted to advocacy or characterized by a signature authorizing the writer's own conclusions and interpretation.

VI.

Fair Play—A newspaper should not publish unofficial charges affecting reputation or moral character without opportunity given to the accused to be heard; right practice demands the giving of such opportunity in all cases of serious accusation outside judicial proceedings.

1. A newspaper should not invade private rights or feelings without sure warrant of public right as distinguished from public curiosity.

2. It is the privilege, as it is the duty, of a newspaper to make prompt and complete correction of its own serious mistakes of fact or opinion, whatever their origin.

VII.

Decency—A newspaper cannot escape conviction of insincerity if while professing high moral purpose it supplies incentives to base conduct, such as are to be found in details of crime and vice, publication of which is not demonstrably for the general good. Lacking authority to enforce its canons the journalism here presented can but express the hope that deliberate pandering to vicious instincts will encounter effective public disapproval or yield to the influence of a preponderant professional condemnation.

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## Social Security and Self-Employed Lawyers

*(Continued from page 974)*

If this plan passed, we would have for the first time a piece of social legislation in this country with substantially complete coverage. Several benefits to the system itself would flow from the very fact of completeness. One is that average benefits would be greater and fairer, since months spent in noncovered employment would no longer exist to drag down the average monthly wage. As shown earlier, fewer people would get an unjustified benefit from the 55 per cent formula applied to low wages. Fewer people, also, would get duplicate benefits because of lack of co-ordination between O. A. S. I. and various plans now covering some of the excluded classes, notably state and local public employees. Among those retired, the deduction for earnings would apply to a wider range of earnings, with resulting reduction of payments to persons still earning and not in need of pensions. All this would tend to reduce the proportionate cost of benefits.

There would also be fewer forfeitures. To be fully insured, a person must have spent at least half of the quarters since January, 1951, in covered employment. Under the present arrangement, therefore, a lawyer who spends slightly less than half of his professional life as a salaried employee, and more than half as a self-employed lawyer or firm member, usually forfeits the value of all the contributions made by his employer and himself while he was an employee. In view of the amount of salaried employment of lawyers, by law firms, insurance companies, trust companies, private corporations, and the government, and the tendency to move between such employment and self-employment, the problems of forfeiture and discrimination are particularly grave in the legal profession.

Most important of all, complete coverage would in a matter of ten years or so reduce the need for public assistance to the bed-rock minimum.[13] The whole idea of social insurance from the start has been to get rid of public relief and the humiliation of the means test. We have so far failed, simply because too large a proportion of employments have been excluded. The present proposal aims to do the job once and for all; but if it is chopped up

13. There will always be a residual class of cases not amenable to insurance treatment, such as persons congenitally deformed from birth or disabled in childhood, which must be handled by public assistance.

by a lot of special exceptions the real solution will only have been postponed.

As long as coverage is incomplete and millions of people arrive at age 65 without social security protection, there will be danger of a successful attack on the entire principle of social insurance. The Chamber of Commerce of the United States is now vigorously proposing, among other things, that every retired person over 65 be paid $25 a month whether he has insured status under O. A. S. I. or not.[14] Why is this fantastic proposal put forth by a reputable and conservative organization and approved by a large proportion of its members? Simply because of the charge of discrimination and inequity which can be made only because some people now retired never had a chance to acquire insured status under O. A. S. I. Bills are constantly introduced in Congress to pay all aged $100 a month or more, for the same reason.[15] These proposals would shatter and discredit the whole insurance idea, and put in its place precisely the kind of something-for-nothing philosophy which the contributory principle was designed to avoid.[16] As long as some groups are uncovered, this danger will persist. If we want to preserve the contributory idea as against Townsendism, the best thing we can do is universalize coverage so that in a few years the kind of demands now made on behalf of the noninsured present retired will no longer be necessary.

Finally, let us look for a moment at duties rather than rights. Although it may sound odd, every income-earner has, in two respects, a duty to join the social security system. In the first place, he has an individual duty so to arrange his financial affairs throughout his life as to avoid the possibility that he or his family will become a charge upon charity or a burden upon public assistance. Nine-tenths[17] of the working population discharge this duty by foregoing present consumption and building up insured status through pay-roll or earnings deductions. What right have the other one-tenth to demand the option of taking a chance on achieving financial independence in old age, meantime expecting the public to provide free public assistance if the gamble fails?

The second kind of duty is a social one. In every social security system, there is necessarily an element of redistribution of income, with the very poor being subsidized by the less poor. This subsidy can be paid in the form of public assistance, food subsidy, housing subsidy, family allowances and free medical care, as in England, and be financed by general taxation, in which case the load is spread among all taxpayers. Or it can, as in this country, be primarily attempted within the framework of the social insurance system itself, by giving relatively high benefits to low-wage groups. In such a system, and to the extent that it displaces public assistance, the burden of subsidizing the poor is borne, not by taxpayers generally, but by the higher-wage employees within the system and by employers. The supporting of this low-income class during wageless old age is a recognized social obligation which would be financed by general taxation if not accomplished through insurance. The plain conclusion, then, is that, to the extent that they are relatively high-income self-employed workers,[18] the one-tenth of American income-earners remaining outside O. A. S. I. and related plans are not pulling their weight in this purely social obligation.

It is submitted, in conclusion, that self-employed lawyers, in their own interest, in the country's interest, and in the interest of good relations between the profession and the public, should accept coverage by the Social Security Act. For those in the lower and middle income brackets there is ample reason in the useful protection afforded by the basic minimal old age pensions and survivor benefits. And for those in the higher income brackets, there is—if nothing else—a sufficient reason in public duty and in responsibility for the ultimate success of our present type of contributory social security.

14. Op. cit. note 2 supra. Note that the objects of the Chamber's solicitude include many members of the classes which affirmatively objected to coverage.

15. Op. cit. note 5 supra, pages 68 and 69.

16. The writer is well aware that some critics deny the right of the present system to be called "insurance". The point here is simply that, even if discriminations unavoidably exist within the system, it retains the two fundamental "insurance" features of contributions establishing insured status, and of a predetermined relation between wages, contributions and benefits in specified contingencies.

17. Eight out of ten income-earners are now under O. A. S. I. If the Railroad Retirement Act, Civil Service Retirement Act, and similar Acts are added, the proportion approaches nine out of ten.

18. Of course, to the extent that some self-employed lawyers are also employers of covered employees, and are making contributions in their behalf, they are bearing a share of this social burden.

# Proceedings of the House of Delegates:

# Diamond Jubilee Meeting, August 23-28, 1953

■ This account of the proceedings of the House of Delegates at the 76th Annual Meeting in Boston contains the full text of all resolutions and recommendations adopted by the House. The House met daily during the Meeting, and discussed many matters of vital interest to the legal profession and the nation. The decisions of the House, which establish the position of the American Bar Association, are therefore of concern to every lawyer.

## FIRST SESSION

■ The first session of the House of Delegates at the 76th Annual Meeting of the American Bar Association convened at 2 P.M. Monday, August 24, 1953, in the Georgian Room of the Hotel Statler in Boston. The Chairman of the House, David F. Maxwell, of Pennsylvania, presided.

The Secretary called the roll of 226 members, and the House accepted the report of the Committee on Credentials and Admissions, given by Committee Chairman Glenn M. Coulter, of Michigan, approving the roster as read.

Members of the House who were taking their seats for the first time were introduced by delegates from their states.

On motion of the Secretary, Joseph D. Stecher, of Ohio, the House voted to approve the record of the 1953 Mid-Year Meeting in Chicago.

Four resolutions were offered to the House by individual members and were referred to the Committee on Draft. The action of the House taken on them is reported below at pages 1038 and 1039.

President Robert G. Storey, of Texas, reported to the House in the dual role of President of the Association and President of the American Bar Foundation.

His report discussed four subjects in some detail: the survey of criminal law administration, undertaken by the Special Committee headed by Justice Robert H. Jackson; Regional Meetings; membership, especially the possibility of some plan of unit membership with the state and local bar associations; and the American Bar Foundation. Mr. Storey announced that the Ford Foundation had made a grant of $50,000 to the Committee on the Administration of Criminal Justice. This $50,000 was a preliminary grant, he explained, for planning purposes. He also announced the appointment of Professor Arthur H. Sherry, of the University of California, as director of the study.

The President also announced that the goal of 50,000 members, set by the Membership Committee, had been reached just before the opening of the meeting.

The President's report was printed in the September issue of the JOURNAL, beginning at page 791.

Allan H. W. Higgins, of Massachusetts, Chairman of the Executive and Building Committees of the American Bar Foundation, pointed out that only 5,000 of the 50,000 members of the Association had contributed to the American Bar Center, and called for more contributions. Mr. Higgins reported that many corporations and nonmember lawyers were making contributions, but that the discouraging thing has been the lack of response from the membership itself.

George Maurice Morris, of the District of Columbia, Chairman of the campaign to raise funds for the Bar Center, gave what he called "A Hortative Family Analysis by Money-Mad Morris", in which he scolded the members of the House for their failure to make contributions. He concluded with a plea to the members of the House not only to get their own contributions in, but to support the area directors of the campaign.

The House then turned to the next item on its calendar, the election of new officers and members of the Board of Governors. The State Delegates had made their nominations at the Mid-Year Meeting of the House, and no other nominations had been filled for the offices. Accordingly, the House cast unanimous ballots for William J. Jameson, of Montana, for President; Joseph D. Stecher, of Ohio, for Secretary; and Harold H. Bredell, of Indiana, for Treasurer. Robert T. Barton, Jr., of Virginia, Richard P. Tinkham, of Indiana, and Herbert G. Nilles, of North Dakota, were elected for three-year terms on the Board of Governors from the Fourth, Seventh and Eighth Circuits respectively.

In his report to the House, Treasurer Harold H. Bredell, of Indiana, said that the raise in dues had increased the general fund by about $168,000, while general Association expenses have increased by about $68,000, so that the treasury is about $100,000 better off than it was last year. Mr. Bredell pointed out that it was very important to "nourish

and preserve" the additional margin of income. He said that $76,000 had been set aside as a reserve for new building equipment and operating maintenance.

Judge Walter M. Bastian, of the District of Columbia, Chairman of the Budget Committee, said in makin his report that "Present income emphasis is being placed upon raising capital funds for the construction of the new headquarters building and library and research center, together with the provisions of initial funds for library and research planning purposes." While those funds are to be provided from sources outside the regular budget, Judge Bastian said that the Committee felt that it was wise to include the Association's present program, operation of the Headquarters office, and the minimum requirements of maintaining the library and research building.

Edward H. Jones, of Iowa, Chairman of the Committee on Co-ordination of Bar Activities, gave a brief oral report.

### Retirement Benefits Committee Reports on Reed-Keogh Bills

George Roberts, of New York, Chairman of the Committee on Retirement Benefits, reported that the Reed-Keogh Bills, which would assist the self-employed to set up a retirement fund by granting a tax exemption on a certain portion of their income earmarked for retirement, had been reintroduced in Congress as the Jenkins-Keogh Bills, with important amendments suggested by the American Medical Association. He called attention to an A.M.A. pamphlet on the subject called "Pensions for the Self-Employed and the Pensionless Employee" which he said contained "all the information that anyone needs to know about these bills". Mr. Roberts urged the members of the House to study the pamphlets and support the Committee's efforts to obtain enactment of the Jenkins-Keogh Bills at the next session of Congress.

Allen L. Oliver, of Missouri, Chairman of the Committee on Unemployment and Social Security, withdrew a resolution by his Committee which would have reaffirmed the Association's stand opposing the inclusion of lawyers in social security. The Committee acted in accordance with a recommendation of the Board of Governors that the Committee make a "further study . . . of the possibilities of a voluntary plan of Social Security for self-employed professional persons. . . . "

On motion of Sylvester C. Smith, of New Jersey, the question was referred back to the Committee for further study and report at the next meeting of the House of Delegates.

Orison S. Marden, of New York, Chairman of the Committee on Legal Aid Work, said in his report: "There are today in the United States twice as many legal aid societies, legal aid offices, as there were in 1946 when . . . at the instigation of my distinguished predecessor, Harrison Tweed, the House directed the Committee to engage in broad promotional activities." He declared that there had been a significant change in the attitude of lawyers and laymen alike toward legal aid, citing one example in the South where 200 lawyers had attended a legal aid luncheon in connection with a state bar association meeting. "A few years ago, in no part of the country could you have got more than ten or fifteen lawyers to come out to a function of that kind" Mr. Marden declared.

Morris B. Mitchell, of Minnesota, speaking for the Committee on Judicial Selection, Tenure and Compensation, of which he is Chairman, reported on the the effort to obtain an increase in the salaries of federal judges. Mr. Mitchell said that no increase was possible so long as taxes are not cut and the budget remains unbalanced, but that Congress had set up a commission of eighteen members to study the matter of judicial and professional salaries. "The passage of the bill setting up this salary study commission", Mr. Mitchell said, "was a big step toward our ultimate goal of judicial salary increases, and we are convinced was the only action along this line which could possibly have been obtained from the last session of the 83d Congress." He explained that the Committee had divided the country into four areas and appointed a chairman for each area to lead the drive for increasing judicial salaries. Each area chairman, in turn, has appointed chairmen for the circuits in his area, and the circuit chairmen have appointed state chairmen. Mr. Mitchell praised the enthusiasm and support given by lawyers on the matter. At his request, the House heard brief reports from three of the four regional chairmen: Bernard G. Segal, of Pennsylvania; C. Richard Wharton, of North Carolina; and James D. Fellers, of Oklahoma. The fourth, Kurt F. Pantzer, of Indiana, was not present in the House.

Thomas J. Boodell, of Illinois, Chairman of the Committee on Unauthorized Practice of the Law, in his report for that Committee, commented on *Bar Association* v. *Union Bank of Little Rock,* in which the Bar Association of Arkansas succeeded in a suit to enjoin the defendant bank from practicing law. Mr. Boodell described the case as a complete victory for the association, remarking that such periodic litigation is necessary to prevent the unauthorized practice.

Mr. Boodell proposed the following resolutions, which were adopted without debate:

> RESOLVED, That the report of the Conference of Lawyers and Life Insurance Companies concerning the "Dissemination of Legal Information by Home Office Counsel" in substantially the form of the report attached hereto be and the same is hereby approved subject to the ratification and approval thereof by the governing bodies of the American Life Convention and the Life Insurance Association of America.
>
> FURTHER RESOLVED, That the members of the Standing Committee on Unauthorized Practice of Law of this Association as members of the National Conference of Lawyers and Life Insurance Companies, be and they hereby are authorized to

join with the life insurance industry conferees in the preparation of an article establishing some guide-posts for cooperation between lawyers and life insurance representatives, and to give proper publicity to such statement.

The report of the Committee on Scope and Correlation of Work, by Chairman James L. Shepherd, Jr., of Texas, made two recommendations. The first was as follows:

> That the Special Committee on the Rights of the Mentally Ill be continued for the purpose of carrying forward and completing its present program.

Mr. Shepherd explained that the Committee on Rights of the Mentally Ill had been created to carry out an ambitious program which called for extensive investigation, requiring a large appropriation that was not available. In 1949, the committee had been given the job of formulating "a set of minimum standards for legal procedures involving the commitment, release, examination, supervision and public records of the cases of those persons who are mentally ill". The Committee had made substantial progress on this, Mr. Shepherd said, and he recommended that it be continued so that it could finish its task.

The second recommendation of the Committee on Scope and Correlation was this:

> That the Association not create at this time a special committee on Standards of Ethical Conduct for Public Officials; but that the Section of Administrative Law be directed to further study and report on the matter.

Mr. Shepherd said that the proposal to create a special committee had been offered at the last meeting of the House, and referred to Scope and Correlation. His Committee's view was that the need for such a special committee had not been demonstrated, and that it was best for the Section of Administrative Law to continue to watch the subject and report to the House.

Both of the Committee's proposals were adopted without debate.

The House then recessed at 4:15 P.M. until the following morning.

## SECOND SESSION

■ The second session of the House of Delegates convened at 9:30 A.M. on Tuesday, August 25, with Chairman Maxwell presiding.

Arnold W. Knauth, of New York, Chairman of the Committee on Admiralty and Maritime Law, reporting for that Committee, proposed the following resolution which was adopted without debate:

> RESOLVED, That it is the sense of the American Bar Association that there is a recognized need for revision of the Admiralty Rules heretofore promulgated by the Supreme Court of the United States, and that the Standing Committee on Admiralty and Maritime Law and the Section of Judicial Administration be and they hereby are authorized to cooperate with the Maritime Law Association of the United States and other interested organizations in submitting and recommending to the United States Supreme Court proposals for revised Rules of Admiralty Practice.

Mr. Knauth called attention to a pamphlet published by the Maritime Law Association which contained a report on how to bring the Federal Rules of Civil Procedure and the Rules of Admiralty Practice into the closest possible harmony. The House was not asked to act upon the Maritime Law Association's report.

Judge Richard Hartshorne, of New Jersey, speaking for the Section of Judicial Administration, said that the Section was in full accord with the Committee's resolution.

The House then elected Martin J. Dinkelspiel, of California, a member of the Committee on Scope and Correlation of Work.

Henry S. Drinker, of Pennsylvania, Chairman of the Committee on Professional Ethics and Grievances, in his report for that Committee, proposed the following amendment of Canon 46 of the Canons of Professional Ethics:

> CANON 46. *Notices to local lawyers.* A lawyer, available to act as an associate of other lawyers in a particular branch of the law, may send to local lawyers only, and publish in his local legal journal, a brief and dignified announcement of his availability to serve other lawyers in connection therewith. The announcement should be in a form which does not constitute a statement or representation of special experience or expertness.

Mr. Drinker explained that several state and local associations have adopted canons permitting lawyers to send out notices to other lawyers and insert notices in legal journals announcing that their services in particular branches are available to other lawyers. Mr. Drinker said that his Committee could see nothing wrong with the practice and felt it absurd for the American Bar canons to forbid a practice sanctioned by local canons when no one could see anything wrong with the practice. He emphasized the fact that there was nothing in the Committee's proposal that would allow lawyers to advertise themselves to the public or which would imply that lawyers who came within its provisions were "specialists" or "experts" in particular branches.

Harrison Tweed, of New York, speaking on behalf of the Committee on Continuing and Specialized Legal Education, which was appointed to study the whole problem of the feasibility of setting up standards to qualify specialists in different branches of the law, said that that committee felt that adoption of the amendment would in effect be lowering the bars to permit lawyers to announce themselves as specialists. He moved that the proposed amendment of Canon 46 be referred back to the Board of Governors for reconsideration in the light of the report of the Committee on Continuing and Specialized Legal Education. "It would hardly seem that a postponement of six months in connection with an innocuous amendment of a section of a canon which has stood the way it has stood for a number of years can hardly be devastating" Mr. Tweed argued.

The House voted to refer the amendment to the Board.

Judge Orie L. Phillips, Chairman of the Survey of the Legal Profession, reported that the Survey is substantially complete, with only the two final reports by Director Reginald Heber Smith, of Massachusetts, and George Waverley Briggs, of Dallas, Texas, left to be written. Mr. Smith's report will be on the "Legal Profession in the United States", while Mr. Briggs will appraise the whole Survey from the point of view of an informed layman discussing the merits of the Survey's recommendations. Judge Phillips said that when the Survey has been completed, the work will only have begun, for the Bar will then be faced with the task of implementing and putting into effect the recommendations of Mr. Smith and Mr. Briggs.

John C. Satterfield, of Mississippi, reporting for the Committee on Amendment of Rule 71-A in the Supreme Court, moved adoption of the following:

> That the Special Committee to appear before Congress to urge appropriate legislation to restore the right to trial by jury in cases of condemnation of land in the United States District Courts be continued.

Mr. Satterfield reported that the Judiciary Committee of the Senate had acted favorably on a bill restoring the right to jury trial in condemnation cases, and the bill passed the Senate with an amendment. The matter is now before the Judiciary Committee of the House of Representatives.

The House of Delegates voted to continue the Committee.

### Federal Judiciary Committee Makes Its Report

The Chairman of the Committee on Federal Judiciary, Howard F. Burns, of Ohio, reporting for that Committee said that Attorney General Brownell had continued the arrangement made with former Deputy Attorney General Malone under which names of lawyers being seriously considered for appointment to the federal Bench were submitted to the Committee in advance of nomination. Mr. Burns also said that the Committee had abandoned its practice of making recommendations to the Department of Justice on every vacancy on the Federal Bench, because it is impossible in the larger districts for the Committee to list all the available and qualified men. Mr. Burns also reported on existing vacancies in the federal courts and on recent nominations.

The House then turned its attention to the report of the Special Committee on Disciplinary Procedures, given by former Senator Forrest C. Donnell, of Missouri, the Chairman. Senator Donnell said that the work of his Committee was twofold, one aspect being to develop a statement of philosophy on the subject of professional discipline and the other to suggest a comprehensive program to put the philosophy into practical operation. To accomplish this, the Committee had undertaken to prepare a Model Disciplinary Code.

The House first voted to continue the Special Committee, and then began discussion of the Committee's recommendation of a statement of principles, which was considered a paragraph at a time. It is printed here in the form finally adopted by the House.

> RESOLVED, That the following statement of principles be approved and adopted:
>
> The purpose of discipline of lawyers is the protection of the public, the profession and the administration of justice, and not the punishment of the person disciplined.
>
> Only persons of integrity and good character should be permitted to practice law.
>
> Persons admitted to practice law in the state are a part of the judicial system of such state and officers of its courts.
>
> A license to practice law confers no vested right, but is a conditional privilege revocable for cause.
>
> The highest court of the state has the inherent power and the duty to prescribe the qualifications that shall be required for admission to practice law, to admit persons to practice law, to prescribe standards of conduct for lawyers, to determine what constitutes grounds for the discipline of lawyers; to discipline, for cause, persons admitted to practice law in such state, and to revoke the license of every lawyer whose unfitness to practice law has been duly established. Such court may not properly delegate the final exercise of such power or duty, or recognize the existence of either elsewhere than in itself.
>
> It is impossible to determine at the time of the revocation of a license to practice law when, if ever, the person whose license is revoked will become qualified for readmission. Therefore, revocation should not be for a stated period and should place on the person whose license has been revoked and who seeks readmission the burden of establishing by clear and convincing proof that he possesses the qualifications for readmission, which should not be less than those required for original admission.
>
> It is the obligation of the organized Bar and the individual lawyer to give unstinted co-operation and assistance to the highest court of the state in discharging its function and duty with respect to discipline and in purging the profession of the unworthy.

In reply to several questions from the floor, Senator Donnell said that what his Committee was proposing was a code of procedure, that there was no intention of changing the existing Canons of Ethics and that in emphasizing disbarment, the Committee hoped to do away entirely with the use of suspension for a stated period as a means of discipline.

The Board of Governors had recommended that the word "primary" be added as the second word in the first paragraph of the resolution and that the phrase beginning with "and not the punishment" be eliminated, so that the paragraph would have read "The primary purpose of discipline of lawyers is the protection of the public, the profession and the administration of justice."

Senator Donnell opposed that amendment, arguing that it gave the implication that there was another purpose of discipline with no explanation as to what the other purpose might be. He declared that the word "discipline" carries no connotation of "punishment".

There was considerable debate on the latter point, Floyd E. Thompson and Albert E. Jenner, Jr., of Illinois, and George Brand, of Michigan,

supporting Senator Donnell in arguing that disciplinary action, properly speaking, was not designed to punish lawyers and that the notion of punishment which has crept into the decisions hampers the administration of discipline, since courts apply tests of sympathy and concern for the lawyer rather than the tests of public protection.

The proposed amendment was defeated and that paragraph was adopted in the form reported out by the Committee.

The last sentence of the fifth paragraph as submitted by the Committee, read "Such court may not properly delegate such power or duty, or recognize the existence of either elsewhere than in itself." The words "the final exercise of" after the word "delegate" were added on motion of Robert T. Barton, Jr., of Virginia, on the ground that in many states the question of disbarment is often first presented to a commission or lower court, and that the Committee's original language would have amounted to interference in a purely local matter. The House adopted this view, and approved Mr. Barton's amendment, in spite of Senator Donnell's argument that the power to disbar lies exclusively in the hands of the authority which admits lawyers to practice, the highest court of a jurisdiction. Mr. Donnell argued that the Committee's language was not in the least inconsistent with the use of commissions to find the facts in disbarment proceedings. John C. Satterfield, of Mississippi, Charles H. Woods, of Arizona, Frank W. Grinnell, of Massachusetts, Hicks Epton, of Oklahoma, Judge William C. Walsh, of Maryland, J. Cleo Thompson, of Texas, Loyd Wright, of California, Edward L. Cannon, of North Carolina, Albert E. Jenner, Jr., of Illinois, Clifford W. Gardner, of Minnesota, Whitney North Seymour, of New York, and Francis W. Hill, of the District of Columbia, took part in the debate. A motion by Mr. Woods that the matter be referred back to the Committee was lost, and the recommendation was adopted as amended by Mr. Barton's motion.

Ben R. Miller, of Louisiana, moved to delete the entire sixth paragraph.

Mr. Miller said that the language proposed by the committee attempted to direct the highest court in a state "in the ultimate and exact method by which it may exercise its inherent power", and he also read the paragraph as saying that a lawyer suspended would have to take a new bar examination in order to be readmitted.

Senator Donnell, in reply, said that the Committee wanted to see the abandonment of suspension for definite periods of time as a means of discipline. He declared that it is "highly illogical to say that a court may look forward with the eyes of prophecy and say that on December 31, three years from now, a man's failings and defects will have been removed." While the court should have a right to readmit a disbarred attorney, the Senator said, "from the standpoint of the protection of the public, he should show them that he possesses qualifications not less than those which he would have been required to possess in order to be admitted in the first instance".

The motion to delete the paragraph was lost, 76 to 60.

Former Governor John M. Slaton, of Georgia, whom the Chair introduced as an old and revered member of the House, said:

> I just wish to ask, is the last paragraph essential, since it is an interpretation of the whole law? . . .
>
> This last section says, "It is the obligation of the organized Bar and the individual lawyer to give unstinted cooperation and assistance to the highest court of the state." It then becomes not a question of decision as to justice but a question of following the opinions of the majority of that court. . . .
>
> I simply submit that question to the members of this body.

The Committee's seventh recommendation was adopted.

The House then turned to the report of the Committee on the Administration of Criminal Justice, delivered by Justice Robert H. Jackson. He announced the grant of $50,000 to the Committee by the Ford Foundation for the Committee's planning effort and the choice of Professor Arthur H. Sherry, of the University of California, as executive director of the study. Mr. Justice Jackson said that the study would begin with a factual Survey to determine the weak spots in our system of justice. "We don't propose to go into the cause of crime, or the psychological, sociological, or political science factors that might be involved. That is being studied by other people and it isn't particularly a lawyer's job." Mr. Justice Jackson declared that he hoped to have a more definite report at the Mid-Year Meeting of the House.

The report of the Committee on Communist Tactics, Strategy and Objectives was delivered by Herbert R. O'Conor, of Maryland, the Chairman of the Committee. Senator O'Conor said that the Committee had been working very closely with Attorney General Brownell, carrying out a resolution adopted by the House of Delegates at the 1953 Mid-Year Meeting calling attention to the conduct of members of the legal profession who have been identified as Communists, or who have refused to answer certain questions before congressional committees on the ground that their testimony might incriminate them.

Senator O'Conor proposed two resolutions, both of which the House adopted:

> 1. That the Committee be continued and consist of ten members.
>
> 2. That the Committee be authorized to co-operate with the Attorney General of the United States and State and Local Bar Associations when so requested by them, in any inquiry or disciplinary proceeding pertaining to Communist attorneys.

The report of the Committee on Individual Rights as Affected by National Security, was given by Whitney North Seymour, of New York, the Chairman of the Committee. He had three recommendations:

> I. RESOLVED, That the Special Committee on Individual Rights as Affected by National Security be continued.

II. RESOLVED,

1. That the American Bar Association reaffirms the principles that the right of defendants to the benefit of assistance of counsel and the duty of the Bar to provide such aid even to the most unpopular defendants involves public acceptance of the correlative right of a lawyer to represent and defend, in accordance with the standards of the legal profession, any client without being penalized by having imputed to him his client's reputation, views or character.

2. That the Association will support any lawyer against criticism or attack in connection with such representation, when, in its judgment he has behaved in accordance with the standards of the Bar.

3. That the Association will continue to educate the profession and the public on the rights and duties of a lawyer in representing any client, regardless of the unpopularity of either the client or his cause.

4. That the Association request all state and local associations to cooperate fully in implementing these declarations of principles.

III. RESOLVED, That the freedom to read is a corollary of the constitutional guarantee of freedom of the press and American lawyers should oppose efforts to restrict it.

Commenting on the second resolution, Mr. Seymour said that lawyers were often penalized and criticized in the eyes of the public for accepting clients who represent unpopular causes. " . . . it is important" he declared, "to make it clear to the public . . . just why lawyers feel obligated to undertake such cases, and that they do not undertake them out of sympathy for the view or activities of the defendant". The resolution was aimed at clarifying the position and the duty of the Bar, he added. The resolution was adopted.

The Committee's third resolution, Mr. Seymour declared, "puts the Bar on record in the present discussion which has been roughly described as the book-burning discussion, because it is perfectly clear, I submit, that freedom of the press involves the corollary concept of the freedom to read, not a requirement that anybody read something, not a requirement that anybody be forced to have something available, but a principle that people should not be deprived by government or official action of access to books which they want to read, assuming that they do not violate obscenity laws or other laws."



### House Passes Resolution on "Right To Read"

Mr. Seymour added that there was no question about books in American libraries abroad, for it is quite plain that the officials in charge can eliminate from them books that do not fairly portray the American system or the American scene.

The resolutions were passed without debate.

James R. Morford, of Delaware, Chairman of the Membership Committee, making his report, noted that the Association's membership has increased by 6500 during the last three years. He said that, by normal techniques, the normal growth would be 2000 to 2500 per year. He suggested that it might be well to conduct a nationally organized campaign, somewhat similar to that for contributions to the American Bar Fund, to double the membership of the Association. Mr. Morford said that such a campaign, which he suggested be held two or three years from now, would enable the Association to abolish its membership committee.

The House then recessed at 12:25 P.M.

### THIRD SESSION

■ The House convened for its third session at 9:30 A.M. on Wednesday, August 26, with Chairman Maxwell presiding.

Theodore Voorhees, of Pennsylvania, Chairman of the Committee on Lawyer Referral Service, made a brief progress report for that Committee. He said that there were now nearly a hundred lawyer referral services in the country, and that some forty additional bar associations are considering establishing a service. He emphasized the importance of co-ordinating lawyer referral work with legal aid, legal service to the Armed Forces, and grievance committee work. He declared that the public relations aspects of lawyer referral and legal aid are invaluable, and urged the Association to continue to support those programs "to secure the assurance that legal services are available to all people in all communities regardless of their economic status".

Martin J. Dinkelspiel, of California, reporting for the National Conference of Commissioners on Uniform State Laws, said that the meeting of the Commissioners, held just prior to the Association's meeting, had approved the Uniform Adoption Act and the Uniform Rules of Evidence Act, and had amended the Uniform Ancillary Administration of Estates Act and the Uniform Simultaneous Death Act. The action of the Commissioners was approved.

Roy E. Willy, of South Dakota, the Chairman of the Resolutions Committee, summarized the sixteen resolutions introduced in the Assembly for the benefit of the members of the House.

E. Smythe Gambrell, of Georgia, Chairman of the Special Committee on Regional Meetings, pointed out the importance of the regional meeting program to the Association. Mr. Gambrell declared: "We must face the fact that of more than 225,000

lawyers in this country at the present time, we have less than 25 per cent enrolled as members of the American Bar Association, and that of that membership, only about 1,000, or less than one half of one per cent, have attended as many as two Annual Meetings in the past five years." Mr. Gambrell said that the regional meeting program was the best way of reaching the "great majority of lawyers of the country [who] have no first-hand information regarding the American Bar Association". He outlined the plans for the Southeastern Regional Meeting, to be held in Atlanta, Georgia, in March, in connection with the Mid-Year Meeting of the House of Delegates, and the Pacific Northwest Regional Meeting, to be held in Portland, Oregon, in May.

Secretary Stecher then moved for the approval of the report of the Board of Governors. He called particular attention to a Board resolution endorsing the program of the American Law Student Association and a declaration of policy whereunder any proposals for research studies emanating from Sections and Committees be referred to the American Bar Foundation so that there may be centralized control of such undertakings.

On motion of Louis E. Wyman, of New Hampshire, the House voted to defer action upon a portion of the Board's report dealing with advertising by certain insurance companies. Mr. Wyman was the sponsor of a resolution in the Assembly condemning such advertising. The remainder of the Board's report was approved.

The House then turned its attention to proposed changes in the By-Laws of the Association sponsored by the Committee on Rules and Calendar, under the Chairmanship of John D. Randall, of Iowa. This Committee had six proposed amendments to the By-Laws which were taken up one at a time in the House. The first was as follows:

(1) Amend Article X, Section 6, by inserting a new line after line 18, Legal Aid Work, to read:

*Legal Assistance for Servicemen*

and by renumbering the lines of Section 6 accordingly.

(2) Amend Article X, Section 7, by adding a new subsection to follow subsection (p) as follows:

(q) *Committee on Legal Assistance for Servicemen.* This Committee shall have jurisdiction of all matters in the field of legal assistance for servicemen, and particularly with respect to (1) the developing and conducting of a legal assistance program to help members of the Armed Forces and their dependents in obtaining civilian legal counsel in regard to their civil (but not military or criminal) legal affairs, (2) the consideration and conduct of all matters allied with or pertinent to such legal assistance program, and (3) cooperating and collaborating with the Department of Defense, the Army, Navy, Air Force, Marine Corps and Coast Guard, State and local bar associations, the Legal Aid Work and Lawyer Referral Service Committees of the Association, and other agencies, both public and private, interested or participating in such legal assistance program.

(3) Reletter present subsections (q) to (aa) as (r) to (bb) respectively.

Mr. Randall explained that the purport of this amendment was to change the Special Committee on Legal Assistance for Servicemen into a Standing Committee. The By-Law was approved without discussion.

The second proposed by-law change was also adopted without debate. The proposal was as follows:

(a) Amend Article I, Section 3, by substituting for lines 1 and 2 thereof the following:

Any member of the Association who shall have been a member in good standing for a period of ten years, and shall have paid the equivalent of regular senior dues for ten years so that the first sentence of this section will read as follows:

SECTION 3. *Life Membership.* Any member of the Association who shall have been a member in good standing for a period of ten years, and shall have paid the equivalent of regular senior dues for ten years may become a life member of the Association upon written notice to the Treasurer and payment of such sum for life membership as may be fixed from time to time by the House of Delegates upon the recommendation of the Board of Governors.

The next proposal to amend the by-laws inspired some discussion. The proposal was as follows:

(b) Amend Article I, Section 7, by deleting from line 4 thereof the word "continuously" so that this section will read as follows:

SECTION 7. Special List of Members. Any member of the Association who shall have attained the age of seventy years, and who has been a member of the Association in good standing for at least twenty-five years, shall, upon his request, have his name placed upon a special list of members, and shall thereafter be exempt from further payment of Association dues.

Mr. Morford, of Delaware, the Chairman of the Membership Committee, said that he had been in correspondence with a member who was qualified for exemption from the payment of dues, but who refused to ask for the exemption. Mr. Morford said that this member thought that to request the exemption was asking for charity, which the member refused to do. The member suggested that the exemption be made automatic. Mr. Morford, who took no stand on the merits of the member's proposal, asked whether the Committee had considered this view. Mr. Randall replied that it had, and that he did not feel it was a question of charity.

Secretary Stecher pointed out that over 60 per cent of the members of the Association are over 45, and that the Association could not afford a provision automatically exempting long-standing members from payment of dues. He added that the mechanics of such a provision would be unworkable.

The proposed amendment was then adopted as offered by the committee.

The Committee's next proposal also aroused some discussion:

(c) Amend Article XI, REPORTS OF SECTIONS AND COMMITTEES as follows:

(1) Delete Section 1 thereof, and substitute in lieu thereof the following:

SECTION 1. Any committee or section making a report to the House of Delegates shall, prior to a meeting of the House of Delegates, on or before a date fixed by the Board of Governors, prepare and transmit

to the House of Delegates through the Board of Governors its written report covering a summary of its activities, and recommendations for Association action, if any. No report recommending Association action which has not been so transmitted through the Board of Governors shall be submitted to the House of Delegates unless waiver is obtained in accordance with Section 3 of this Article. No section report recommending Association action shall be received by the House unless it shall have been approved by the section at a regularly authorized meeting thereof or unless authority shall have been granted by the section to its council to act for the section, and said report shall show the basis of section action.

(2) Amend Section 3 thereof by inserting at the end of the sentence in line 6 the words "with or without conditions," and inserting in line 9 after the words "Rules and Calendar" a period and the words "Such written notice shall be given," so that Section 3 as amended will read

SECTION 3. No report recommending Association action shall be considered by the House of Delegates unless there shall have been compliance with the provisions of Sections 1 and 2 of this Article or unless compliance is waived by a two-thirds vote of the House of Delegates present at the meeting upon recommendation of the Committee on Rules and Calendar with or without conditions. Any section or Committee desiring a waiver shall give written notice thereof and of the reasons therefor to the Chairman of the Committee on Rules and Calendar. Such written notice shall be given at least ten days before the presentation of the report unless (a) the cause for the proposed waiver has arisen within such period or (b) the report was adopted by the Committee or Section within 10 days prior to or during the meeting of the House of Delegates to which it is submitted and satisfactory reason exists for immediate action by the Association. If a waiver is requested, such written notice shall fully set forth facts justifying the waiver.

In reply to a question posed by Mr. Morris, of the District of Columbia, Mr. Randall said that the matter had not been discussed at the Conference of Section Chairmen. Mr. Morris then moved the matter be postponed until the views of the Section Chairmen had been obtained.

Mr. Randall declared that the Section Chairmen had been invited to present their views, that three had appeared who represented the consensus of the rest, and that they agreed to the proposal.

There was some further discussion, in which Mr. Morris, Secretary Stecher, Allan H. W. Higgins, of Massachusetts, and Thomas B. Gay, of Virginia, participated. The House finally adopted the amendment, rejecting Mr. Morris' motion for postponement.

The last change in the By-Laws moved by Mr. Randall was as follows:

(3) Insert a new Section 4 as follows:

SECTION 4. No section or committee report expressing views contrary to action heretofore taken by the Association shall be received by the House unless the same contains a definite recommendation to change the action previously taken by the Association, and the reason for such change.

(4) Renumber present Section 4 as Section 5.

Considerable opposition to this proposal was expressed.

Barnabas F. Sears, of Illinois, Floyd J. Thompson of Illinois, H. Cecil Kilpatrick, of the District of Columbia, Frederic M. Miller, of Iowa, Jefferson B. Fordham, of Pennsylvania, W. E. Stanley, of Kansas, Blakey Kelm, of Kentucky, Cuthbert S. Baldwin, of Louisiana, and Stuart B. Campbell, of Virginia, participated in the debate, some arguing that it would be impossible for any Section Chairman to be familiar with all previous actions of the House on all subjects. They said that there was no useful purpose to be served by the amendment. As one member put it, "It sounds like a form of prohibition, and we don't like prohibition down in my state, whether 100 proof, or 30 proof". Proponents of the amendment argued that it was simply a rule of procedure, which did not in any way interfere with anyone's right to bring matters before the House. All that the amendment would do, it was urged, was force a Section to say that it was attempting to change previous action of the House if it proposed to overrule a previous action.

On Mr. Baldwin's motion, the proposed amendment was referred back to the Committee on Rules and Calendar.

William Logan Martin, of Alabama, reporting for the Committee on Income Tax Amendment, said that hearings on the proposal to limit income taxes by constitutional amendment would not be undertaken in Congress until next year. His proposal to continue the Committee was adopted without debate.

### 20,000,000 G.I. Cases Handled in Ten Years

The report of the Committee on Legal Service to the Armed Forces was given by Harry Shriman, of Illinois, a member of the Committee. Mr. Shriman gave a brief oral report in which he said that in the ten years of its existence the program of legal

service to the Armed Forces had handled 20,000,000 cases. Mr. Shriman explained that his committee was essentially a co-ordinating committee, whose primary function is to co-ordinate and stimulate the activities of state and local bar associations dealing with legal service to servicemen. "The Committee's success or failure . . . depends entirely, in every degree, on the co-operation of state and local war work committees . . . " he declared.

Glenn M. Coulter, of Michigan, Chairman of the Committee on Credentials and Admissions, had a further report from his Committee which the House then considered. The Committee recommended that the Maritime Law Association of the United States be approved by the House as an organization to be represented in the House through affiliation with the American Bar Association.

There was considerable debate on the admission of this association because of a peculiarity in its by-laws which provide for a limited number of lay members, not exceeding 10 per cent of the total membership. Mr. Coulter said that the Maritime Law Association had been at all times controlled by lawyers and that the lay membership has consisted of individuals dealing in the maritime field who have a great deal of contact with the law.

Charles M. Lyman, of Connecticut, Floyd E. Thompson, of Illinois, W. W. Gibson, of Minnesota, James R. Morford, of Delaware, Osmer C. Fitts, of Vermont, Joseph W. Henderson, of Pennsylvania, Walter M. Bastian, of the District of Columbia, Thomas B. Gay, of Virginia, W. E. Stanley, of Kansas, Edwin M. Otterbourg, of New York, Cody Fowler, of Florida, George E. Brand, of Michigan, and Arnold W. Knauth, of New York, took part in the debate. Those who were opposed to the admission of the Maritime Law Association argued that this was "an entering wedge for many other organizations that have a small percentage of lawyers, that are business organizations and the majority of them are laymen, to come into this House of Delegates". Those favoring the admission took the position that the Maritime Law Association was an important organization, representing the shipping interests of the country, and that their affiliation would strengthen the influence of the American Bar Association. It was pointed out that both the American Judicature Society and the American Patent Law Association can have nonprofessional members.

The House finally voted to affiliate the Maritime Law Association.

Paul W. Lashly, of Missouri, speaking for the Junior Bar Conference, reported its progress during the year. Mr. Lashly said that the Conference had affiliated four new local junior bar associations and is considering the qualifications of four more. He noted that the American Law Student Association had added eleven new student chapters, so that there are now chapters in all but twelve of the 123 accredited law schools.

Albert MacC. Barnes, of New York, the Chairman of the Committee on Customs Law, gave a report which summarized recent developments in the customs field. The House of Delegates had given the Committee authority to oppose two provisions of the Customs Simplification Bill at the last meeting. Mr. Barnes said that those provisions had been stricken from the bill as it was passed by Congress. He requested permission from the House to oppose the same provisions which have been reintroduced in Congress in a separate bill. Chairman Maxwell ruled this out of order, on the ground that there were not fifty copies of the bill before the House.

Whitney North Seymour, of New York, speaking for the Section of Legal Education and Admissions to the Bar, moved the following which were adopted without debate:

WHEREAS, Suffolk University Law School of Boston, Massachusetts has applied for provisional approval and invited an inspection; and

WHEREAS, Southern University School of Law of Baton Rouge, Louisiana has applied for provisional approval and invited an inspection; and

WHEREAS, the inspections show that both schools are in compliance with the minimum standards of legal education of the American Bar Association;

NOW, THEREFORE, BE IT RESOLVED, that Suffolk University Law School of Boston, Massachusetts and Southern University School of Law of Baton Rouge, Louisiana be granted provisional approval subject to annual inspection until full approval be granted.

Morton P. Fisher, of Maryland, reporting for the Section of Taxation, moved that the House vote to oppose

H.R. 485, which deals with the attorneys practicing before the administrative bodies.

Ashley Sellers, of the District of Columbia, moved that the bill be referred to the Section of Administrative Law and the Committee on Unauthorized Practice of the Law. Mr. Fisher consented to this, and the referral was made without further debate.

Richard S. Doyle, of the District of Columbia, Chairman of the Committee on Court of Claims, reviewed the history of his Committee, which was appointed in 1941 to consider a proposal that the Court of Claims be reconstituted into trial and appellate courts and to consider revision of the rules of the Court so as to make them conform, in so far as possible, to the Federal Rules of Civil Procedure. The first proposal was decided negatively, and the House voted to approve the Committee's decision. Mr. Doyle said that the change in rules of the court had been effected, and the new rules were a great improvement. The Committee had also supported, with the Committee on Jurisprudence and Law Reform, technical changes in the judicial code, and had opposed a proposal to give the Comptroller General a review of judgments against the United States of district courts and the Court of Claims. Mr. Doyle said that his committee felt that its work was done, and that he was not asking that it be continued.

### Civil Service Resolution Referred to Foundation

Joseph A. McClain, Jr., of North Carolina, a member of the Committee on Civil Service, reporting for that Committee, proposed a series of recommendations increasing the coverage of civil service. Under these recommendations the Association would have urged that postmasters, United States marshals, collectors of customs and customs officials be put under the merit system, and the Association begin studies of the possibility of placing United States attorneys and other federal and state legal and court personnel under civil service.

The House voted to refer this series of recommendations to the American Bar Foundation, in line with the policy, adopted by the Board of Governors and approved by the House, of referring all proposals for initiating studies and surveys to the Foundation. The motion to refer was made by Mr. Higgins, of Massachusetts, who declared that the question of extending the merit system to cover the positions proposed "ought not be done piecemeal" and without "adequate investigation and reporting of the facts". He declared that there is a tendency to "believe that everything that was Civil Service is virtuous and everything that is non-Civil Service is crooked. I just don't believe that that is a fact." He pointed out that Civil Service regulations have become so complex that it is virtually impossible to discharge a civil service employee for inefficiency.

Mr. Barnes, of New York, argued that the provision with respect to customs officials be referred to the Committee on Customs Law. "We should approach [the problem] through a Committee that know what they are talking about before it is referred to another committee or another organization that has to start from scratch" he argued.

Mr. McClain agreed to the referral to the Foundation.

On motion of Secretary Stecher, the House voted to continue the Special Committee on Divorce, Marriage Laws and Family Courts.

The House recessed at 12:30 P.M.

## FOURTH SESSION

■ The fourth session of the House convened at 9:30 on the morning of August 27. Chairman Maxwell presided.

Arthur J. Freund, of Missouri, Chairman of the Section of Criminal Law, in the report of that Section proposed the following resolution which was adopted without debate:

WHEREAS, the American Bar Association has endorsed a program consisting of several bills now pending in the Congress of the United States to deal with the problem of organized crime in interstate commerce, and

WHEREAS, no final action has been taken by the Congress with respect to these bills or other bills similarly aimed at the control of organized crime, and

WHEREAS, the national crime problem continues to require consideration and action by the bar and the Congress, and

WHEREAS, there are indications that organized crime is being reactivated on a regional and national scale,

NOW, THEREFORE, BE IT RESOLVED, that the American Bar Association reaffirms its support of the anti-crime measures it has heretofore endorsed, and respectfully urges the Congress to take appropriate action with respect to such measures for curbing organized crime in interstate commerce.

The report of the Section of Administrative Law, delivered by John W. Cragun, of the District of Columbia, the Section Chairman, contained one recommendation which was adopted without debate:

BE IT RESOLVED, That the American Bar Association approve in principle

the proposal embodied in the bill, S. 1752, to establish good faith as a defense in certain cases, now pending in the 83d Congress; and

FURTHER RESOLVED, That the Section of Administrative Law, acting through its council, be authorized to further the calling of hearings thereon in the Congress and to represent the American Bar Association at such hearings.

Mr. Cragun explained that S. 1752 would extend the general principle of the Portal-to-Portal Act by providing that once an agency has given a written interpretation of law on a specific case, it could not thereafter change its mind and penalize those who had relied upon the written interpretation. The resolution approved only the principle, not the specific language of the bill.

Chairman James M. Naylor, of California, reporting for the Section of Patent, Trade-Mark and Copyright Law, proposed a change in Canon 27 of the Canons of Professional Ethics which would have permitted lawyers to list their names in telephone directories under the headings "Patent Lawyers" or "Trade-Mark Lawyers". Mr. Naylor said that such listings had been an established custom for many years, until condemned by a recent decision of the Professional Ethics Committee. He pointed out that both the Missouri Bar Association and the California State Bar had declared such listings in the telephone directories proper, and he declared that the proposed amendment to the Canon would not permit any lawyer to obtain "undue publicity". The proposal had approval of the Professional Ethics Committee, he added.

Edwin M. Otterbourg, of New York, spoke in opposition to the amendment. He declared that, in spite of the fact that the proposal was offered in good faith, it was a precedent, "a small breach in the dike against advertising by lawyers" which could destroy the canons once allowed.

John D. Myers, of Pennsylvania, the Section Delegate, speaking for the amendment, said that it was needed to protect the public. He pointed out that if members of the Patent Bar were not allowed to list their names as "patent lawyers", the only names listed in directories under that heading would be nonlawyers, who are not bound by the canons, and there would be no means for the public to identify a patent lawyer.

The House voted against amending the Canon.

Bill Brice, the President of the American Law Student Association, was then introduced to the House by President Storey. He presented a contribution to the Association's building fund from the individual law students attending the Meeting.

The House then turned to the reports of the Committee on Peace and Law Through United Nations and the Section of International and Comparative Law, which had been made a special order of business for that time.

### Alfred J. Schweppe Reports on Bricker Amendment

Alfred J. Schweppe, of Washington, Chairman of the Committee, summarized the developments on the Bricker Amendment since the Mid-Year Meeting of the House. He said that the Senate Judiciary Committee had held hearings on the proposal to limit the President's treaty-making power by constitutional amendment and had reported ten to five in favor of the Bricker Amendment. During the hearings, representatives of the Administration, which is opposed to the Amendment, gave the Association credit for changing the foreign policy of the United States, Mr. Schweppe said, citing a statement of Secretary Dulles that the Administration will not recommend to the Senate for ratification the Covenant on Human Rights, the Treaty on the Political Rights of Women or the Genocide Convention. "So, wholly apart from any technical issue that may exist as respects any text of a constitutional amendment in this field," Mr. Schweppe said, "I think that the members of the American Bar Association and the representatives of the Government are at one on this point, that there was a real evil which has been pointed out through the studies initiated by the American Bar Association, commencing some four years ago, that the Government recognizes that evil, that it has done something about it, that it credits the American Bar Association with the leadership of having aroused the public opinion and changed the foreign policy of the country in that respect. . . ." Mr. Schweppe's report called for no action by the House.

Judge John J. Parker, of North Carolina, the Delegate of the Section of International and Comparative Law, presented the Section's report. The Section recommended specific action with respect to the Bricker Amendment, and its proposal led to the most extended and vigorous debate of the entire Meeting.

The Section had two resolutions on the Bricker Amendment, the first, putting the Association on record as opposing the Amendment and the second calling for an extensive study and debate of the proposal to amend the treaty power.

Judge Parker, in moving the adoption of the Section's resolution opposing the Bricker Amendment, said that the Association had never approved the specific language of the

Bricker Amendment and that there has been no opportunity for study of the so-called Knowland Amendment, which was offered by the Administration in place of the Bricker Amendment. He pointed out that the President, the Secretary of State, the Attorney General, and the Chairman of the House Foreign Relations Committee have all expressed disapproval of the Bricker proposal and that the language of the proposed amendment would seriously handicap the President in his conduct of foreign relations.

Judge Parker declared: "When the founding fathers met in Philadelphia in 1787, they were confronted with chaos in international affairs. The Confederation had broken down, and it had broken down very largely because of its inability to deal with foreign nations. . . . Local matters which would affect international affairs were made subject to the treaty-making power, because the United States had to act as a sovereign power and in no other way could it do so." Judge Parker said that most treaties are treaties of trade which, under the Bricker Amendment, would have to be ratified by the states. "It would absolutely emasculate the Government of the United States, take from it the power to enter into the sort of treaties that we have been entering into for 164 years without danger," he declared. Judge Parker also said that giving Congress power to regulate all executive agreements, as the Bricker Amendment proposes, would have made it impossible for the President to handle such matters as the Berlin Blockade, or the occupation of Germany and Japan, all of which were handled by executive agreements, made by the President as Commander in Chief.

### Debate Begins on Bricker Amendment

George A. Finch, of the District of Columbia, a member of the Committee on Peace and Law and the Editor-in-Chief of the *American Journal of International Law*, speaking in opposition to the Section's resolution, declared that there was nothing in the Bricker proposal that would impair the power of the President to make legitimate treaties or executive agreements. "There is nothing in this amendment that has anything to do with the conduct of the foreign relations of the United States, either by treaty or congressional act, or that would in any way interfere with the powers of the President in these fields. It relates solely to a treaty which would become internal law, bearing upon the rights of private citizens of the United States."

Mr. Finch vehemently denied that there were no dangers in the present treaty provisions. He pointed to Articles 55 and 56 of the Charter of the United Nations, which is a treaty ratified by the United States, which call upon the Government to take action upon a great many economic, social and political matters. He said that the question was not the policy of the present Administration with respect to treaties. "We are thinking about what is going to happen eight years from now."

In reply to questions from the floor, Mr. Finch said that there was not one word in the amendment that would prevent the President from making executive agreements such as the establishment of the 38th parallel as the boundary between North and South Korea or the occupation of conquered territories, and he declared that there would be no occasion to have the states ratify "any treaty which comes within the traditional treaty-making power and that doesn't relate solely to the rights of citizens under their state constitutions and are protected by the Eleventh Amendment".

Frank W. Grinnell, of Massachusetts, speaking in opposition to the Section's resolution, said that the amendment was necessary to prevent a gradual erosion of individual rights and the accretion of power in the Federal Government. Referring to Secretary Dulles' address of the day before, Mr. Grinnell said that the Secretary "has complimented the American Bar Association for pulling the coat-tails of the American people before they stepped into the coal-hole on the sidewalk, and having done that, and having stated that we saved the nation from stepping into that hole, he says the present Administration has changed its policy. It is not going to do what it thought of doing a few years ago. But, he said, since that didn't happen, let's leave the coal-hole open so that eight, ten, fifteen, twenty-five or fifty years from now, somebody else who is then in power in the government can step into it on behalf of the American people." Mr. Grinnell declared that the "itch for power" made it essential to adopt the amendment that would make it impossible for treaties to infringe upon our liberties.

William P. Gray, of California, declared that there was no need for the Amendment. He said that *Missouri* v. *Holland* did not hold that the treaty-making power is greater than the Constitution, and that the Constitution presently contains a sufficient safeguard upon the President in making treaties, and that there is nothing in the decisions of the Supreme Court that holds otherwise.

Frank E. Holman, of Washington, speaking in opposition to the resolution, stressed the fact that the Association had taken the lead in arousing the country to the dangers inherent in the present treaty provisions. Mr. Holman pointed out that the issue had been before the House five times in the past, and that each time the House had voted

to follow the Committee on Peace and Law and the Section had been opposed to the Committee's report. Urging the House not to withdraw from its previous stand, Mr. Holman said, "You can build a new building of stones and mortar, but you will destroy the edifice of this Association, you will destroy its intellectual integrity. You will never send another Committee down to Congress to speak for this Association without the Senators or Representatives saying, 'How do we know if we follow your Committee that two years later your House of Delegates won't turn turtle on us and repudiate us?' "

### Bricker Amendment Is a "Road-block"

Cuthbert S. Baldwin, of Louisiana, supporting Mr. Holman's position, declared that the fact that no treaty had ever been held unconstitutional in 164 years was in fact an argument for adoption of the amendment. He argued that the slowness of the constitutional amendment process made it necessay to act now in adopting an amendment. He quoted one of the opponents of the Treaty: "The Bricker Amendment would throw the coldest water upon the hopes of good Europeans. It would handcuff Americans in all future efforts at integration of the free world. In sum, it is an attempt to put a roadblock across the path of history." Mr. Baldwin added, "I say to you, amen, brothers, that is exactly what it proposes to do."

Jacob M. Lashly, of Missouri, arguing for adoption of the Section's resolution, declared that the question should not be decided on technical parliamentary rules or the doctrine of *stare decisis*. He said: "I do not believe we have had a President, I do not believe we now have a President, and, moreover, I do not believe that at any foreseeable time in the future under the American system we ever will have a President who will be so inept or remiss in patriotism as to present a treaty which would authorize any such departure and barter away the liberties of the American people."

Mr. Lashly said that the proponents of the amendment reminded him of a client of his, an old lady who had a million dollars in bonds and who used the interest to buy more bonds. "She was 80 years old and about to die without any of the good things in life. She was saving them for a day when adversity would come upon her."

W. E. Stanley, of Kansas, speaking against the resolution, declared that he heard in the statements of the opponents of the Amendment "the echoes of the same speeches that were made against the adoption of the Bill of Rights". He declared that the Section was attempting to confuse Congress on the stand of the Association.

Jefferson B. Fordham, of Pennsylvania, told the House that this was a constitutional issue of major proportions and that "an issue of that sort is not settled until it is settled right". He said that the proponents of the Amendment were proceeding on a negative philosophy. "The thing we should do is to see how broad a power is proportional to the need and the exigencies of government and their problems in national leadership." He declared that the treaty power was limited. "We can't make treaties on just anything. It has to be something which is important in the sense of a matter which is a proper subject of international concern." He declared that the Bricker Amendment was substantially an attack on the Union itself.

Mr. Schweppe, urged that if the resolution were adopted the House of Delegates might as well liquidate itself as an institution that has influence in Congress, since it would amount to a repudiation of all that the Association has urged upon Congress in recent months on the Bricker Amendment.

The House then voted on the Section's resolution, which was lost 117 to 33.

Judge Parker then moved the adoption of his second resolution, which called for a continued study and debate of the treaty-clause question. Albert E. Jenner, Jr., of Illinois, objected that this resolution amounted to a reconsideration of the action on the previous resolution. His motion to table was carried.

Lyman M. Tondel, Jr., of New York, Chairman of the International Law Section, next proposed the amended from the floor on motion of T. I. McKnight, of Illinois:

> RESOLVED, That the American Bar Association, noting the Attorney General's decision to set up the "Attorney General's National Committee To Study the Antitrust Laws" with a view to the formulation of a "national antitrust policy that will confirm the principles of private competitive enterprise and, insofar as possible, combine certainty with flexibility" hereby tenders to the Attorney General and his Committee the aid and co-operation of the American Bar Association in this highly important task.
>
> RESOLVED FURTHER, that the Report of the Committee on International Trade Regulation of the Section of International and Comparative Law

of the American Bar Association, dated August 6, 1953, should be carefully studied and that copies thereof be forwarded to the Attorney General, the Attorney General's National Committee, members of Congress, and other interested persons.

Two other resolutions of the Section were adopted without debate. They were as follows:

I.

WHEREAS, the American Bar Association approved in 1950 a program of procedures of international judicial cooperation, especially the practice of procuring evidence abroad, serving judicial documents abroad and obtaining information on foreign law, and

WHEREAS, no legislation has yet been initiated to implement such a program of reform,

NOW, THEREFORE, BE IT RESOLVED, that the American Bar Association recommends the establishment of a small Presidential Commission of representation of the Department of State and Justice and of the Judicial Branch, with a full time reporter as a member, and a larger Advisory Committee of lawyers, judges and law teachers selected for their practical experience in international litigation, their qualifications as procedural experts, or their accomplishments in international or comparative law; and further

THAT, the American Bar Association approves such governmental action as may be necessary to establish the Presidential Commission and Advisory Committee; and

THAT, the President of the Association and the Officers of the Section of International and Comparative Law be authorized to urge such action upon the Secretary of State, the Attorney General, and the appropriate committees of Congress.

II.

WHEREAS, It is in the public interest to encourage the international exchange of professional persons to enable qualified members of the legal profession to become familiar with the laws and procedures of different countries.

RESOLVED, That the Section of International and Comparative Law urge its members to cooperate in the reception and instruction of lawyers from other countries who may come to the United States in connection with projects for the exchange of persons who are members of the legal profession, which may be implemented in the future.

Albert E. Jenner, Jr., of Illinois, Chairman of the Committee on Jurisprudence and Law Reform, reported that a resolution has been introduced in the Senate which proposes a constitutional amendment to protect the appellate jurisdiction of the Supreme Court and fixing the number of justices at nine. Mr. Jenner pointed out that the proposal was in accordance with an amendment approved by the House and that his committee would support the amendment.

Albert B. Houghton, of Wisconsin, Chairman of the Committee on Traffic Court Program, reporting for that Committee said that 15,754,000 traffic cases were processed in the last year by the courts of the 751 cities of 10,000 and over. He pointed out the importance of fair treatment and proper judicial administration in those cases. He reported that his Committee was continuing to work on the problem of traffic safety, on the theory that accidents can be prevented by proper administration of justice.

He had two recommendations, both of which were adopted without debate:

1. That the Special Committee to supervise the traffic court program be continued for the year 1953-1954.
2. That the Traffic Court Program be continued under the supervision of the Special Committee.

The report of the Section of Mineral Law was given by the Section Delegate, William N. Bonner, of Texas. He proposed the following resolution which began as follows:

RESOLVED, That Congress be requested to make a thorough study of the present ownership of land by the Federal Government and that by appropriate legislation it provide for disposition of such lands as are not needed for legitimate governmental purposes such as for national defense, national parks, national forests, and the like. . . .

This resolution was referred back to the Section on the motion of Thomas M. Robertson, of Idaho. Mr. Robertson declared that the resolution gave the impression that the Association was trying to give away the public lands. "From a public relations standpoint," he declared, "I think it is bad."



Osmer C. Fitts, of Vermont, Chairman of the Committee on Hearings, gave a brief oral report. He said that the Committee had held a long hearing on an appeal by Paul Ginsberg, of Pennsylvania, complaining that the Committee on Professional Ethics and Grievances had not decided properly a question on a complaint made to it. Mr. Fitts said that the Committee recommended that the appeal be dismissed. The House voted to adopt the report.

The meeting recessed at 12:55 P.M.

## FIFTH SESSION

■ The House of Delegates convened for its fifth session at 9:30 on the morning of August 28, Chairman Maxwell presiding.

Roy E. Willy, of South Dakota, Chairman of the Resolutions Committee, reported to the House on action taken by the Assembly on sixteen resolutions introduced by members of the Association and disposed of by the Assembly at its Thursday afternoon session. (See page 1010). The House voted to concur in the action of the Assembly on each of these resolutions in which concurrence was necessary.

There was some discussion on the floor of the House on the resolution presented by Mr. Wyman, of New

STATEMENT REQUIRED BY THE ACT OF AUGUST 24, 1912, AS AMENDED BY THE ACTS OF MARCH 3, 1933, AND JULY 2, 1946 (Title 39, United States Code, Section 233) SHOWING THE OWNERSHIP, MANAGEMENT, AND CIRCULATION OF

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TAPPAN GREGORY,
Editor-in-Chief

Sworn to and subscribed before me this 21st day of September, 1953.
[Seal] ELEANOR MUELLER
(My commission expires November 8, 1955.)

Hampshire, on insurance advertising, which suggests that members of juries in personal injury cases are increasing the rates of their own insurance policies. The House voted down an amendment to the resolution offered from the floor which would have added the words "or any other group", so that the resolution would have condemned such advertising by "any insurance company or association of insurance companies or any other group". The amendment was offered by Mr. Baldwin, of Louisiana. Mr. Wyman and Sylvester C. Smith, Jr., of New Jersey, spoke in opposition to the amendment, on the ground that there were no other groups using such advertising and an amendment would make it necessary to return the resolution to the Assembly. The House voted to reject Mr. Baldwin's amendment and to concur in the action of the Assembly.

The complex parliamentary situation surrounding the Peabody resolution on the Bricker Amendment was emphasized again at this session of the House. When Mr. Willy moved that the House concur in the action of the Assembly, which deferred all action on the proposed referendum on the Bricker Amendment "until such time as the Board of Governors or the Houses of Delegates shall deem that such a referendum should be taken", a motion was made to table the resolution. This was voted down by the House. Had the motion to table carried, the House would have been in disagreement with the Assembly, and a referendum would have been necessary. The House voted to concur in the action of the Assembly, deferring the referendum.

The House then passed a motion calling for a rising vote of confidence in one of its members, Robert W. Upton, of New Hampshire, newly appointed United States Senator. The motion was made by James L. Shepherd, Jr., of Texas. Senator Upton thanked the Delegates for their action, saying "my knowledge of your good will and your support will be a great aid to me in that task."

Chairman George Maurice Morris, of the Finance Committee of the American Bar Foundation, reported that 135 members of the House had contributed to the campaign for the American Bar Center, with an average contribution of $532. He said that 41 members had contributed $1000 or more. Mr. Morris again appealed to the members of the House to give active support to the fund-raising campaign.

William N. Bonner, of Texas, and Allan H. W. Higgins, of Massachusetts, addressed the House, praising Mr. Morris' work on the campaign and urging the members to support him. Mr. Bonner announced that the Section of Mineral Law had voted to make a donation to the fund.

On motion of Secretary Stecher, the House voted to approve the remainder of the report of the Board of Governors. Action on the portion of the Board's report dealing with insurance advertising had been postponed.

The House voted to continue the Special Committee on Military Justice, the Washington Committee, and the Special Committee on Lawyers in the Armed Forces.

Secretary Stecher announced the results of the balloting for Assembly Delegates. The following were elected: Paul W. Lashly, of Missouri; James D. Fellers, of Oklahoma; David Nelson Sutton, of Virginia; Walter Chandler, of Tennessee; and Julius Applebaum, of New York.

### Draft Committee Reports on Five Resolutions

Charles H. Rhyne, of the District of Columbia, Chairman of the House's Committee on Draft, reported on five resolutions offered by individual members of the House.

No. 1, offered by Charles H. Woods, of Arizona, called for a study of procedures used by congressional investigations. Mr. Rhyne said that the resolution had been revised by the Committee, with Mr. Woods' concurrence, so as to avoid any possi-

ble construction that the House was criticising the present procedures of any congressional committee. On his motion it was referred to the Committee on Individual Rights as Affected by National Security.

The second resolution, which dealt with denial of individual rights behind the Iron Curtain, was withdrawn because the Assembly had adopted a similar resolution which had already been concurred in by the House.

The third resolution, relating to the initiation of constitutional amendments by two-thirds of the states, introduced by Albert E. Jenner, Jr., of Illinois, on behalf of another member of the House, was referred to the Committee on Jurisprudence and Law Reform.

The fourth resolution introduced by Cuthbert S. Baldwin and George T. Madison, of Louisiana, and John C. Satterfield, of Mississippi, was passed as slightly redrafted by the Committee on Draft:

> WHEREAS, it is the duty and obligation of all members of the Bar, whether employed in governmental service or engaged in the private practice of the law, to at all times uphold the honor and maintain the dignity of the profession and to so comport themselves that they will find their highest honors in a deserved reputation for fidelity to public duty and to private trust; and
>
> WHEREAS, there have appeared in the Press, from time to time and over a long period of time, charges of corruption and dishonesty, and of improper and unethical practices involving certain attorneys who have held high government office and certain attorneys engaged in private practice; and
>
> WHEREAS, such charges tend to bring the Bar of this Country into disrepute:
>
> NOW, THEREFORE, BE IT RESOLVED BY THE AMERICAN BAR ASSOCIATION, That this Association condemns any activities on the part of attorneys, including those who have held or may now hold governmental office, or who are engaged in the private practice of law, which tend to bring the profession into disrepute; and recommends that any charges alleging such improper practices should be promptly investigated by the proper Committees of the American Bar Association and the various State and local Bar Associations or other agencies of the Courts or bodies having jurisdiction to the end that such persons, if found guilty be censured by or suspended or expelled from such Associations, if members, and officially censured or suspended or disbarred from the practice of law.
>
> BE IT FURTHER RESOLVED, That this Resolution be referred to the Standing Committee on Professional Ethics and Grievances of this Association and that copies thereof be sent to the various State and local Bar Associations.

The fifth resolution, offered by the Committee on Draft, was unanimously adopted:

> RESOLVED, That the House of Delegates of the American Bar Association, both on its own behalf and on that of the Association, expresses its deep appreciation of the warm welcome and generous hospitality extended to the Members of the Association and their ladies by the gracious people of New England, on the occasion of the Annual Meeting celebrating the Seventy-Fifth Anniversary of the Association; and
>
> FURTHER RESOLVED, That the House extends its particular thanks to the Commonwealth of Massachusetts, to the City of Boston, to the Boston Bar Association, to the Massachusetts Association of Women Lawyers, to the Massachusetts Bar Association, to the Middlesex Bar Association, to the New Hampshire Bar Association, to the Norfolk Bar Association, to the Plymouth County Bar Association, to the Rhode Island Bar Association, and to the Vermont Bar Association, and especially to all the members of the Committee for the American Bar Association Convention in Boston, and their ladies, for all that each and every one of them has done to make this Annual Meeting a truly memorable occasion; and
>
> FURTHER RESOLVED, That the Secretary of the Association send copies of these Resolutions to the Governor of the Commonwealth of Massachusetts, to the Mayor of the City of Boston and to the proper officers of the participating organizations above mentioned.

Sylvester C. Smith, Jr., of New Jersey, addressed the House on the subject of the Bar Center. He pointed out that the present Headquarters building is hopelessly inadequate, and that proper quarters would mean more efficient and less expensive service per member. He urged that that be used as a proposition to sell the fund-raising campaign.

Mary H. Zimmerman, of Michigan, told the members of the House that the National Association of Women Lawyers had voted to collect for and present an appropriate memorial for the new Center.

The House then adjourned *sine die* at 10:45 A.M.

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